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In The
Supreme Court of the United States

VERNON JONES, MARILYN BOYD DREW, MORRIS WILLIAMS and RICHARD STOGNER, in their individual capacities,

Petitioners,

v.

MICHAEL BRYANT, JOHN DRAKE, BECKY KELLEY and HERBERT LOWE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT B. REMAR*
KERRI A. GILDOW
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-4700

Attorneys for Petitioners Marilyn Boyd Drew, Morris Williams and Richard Stogner
**Counsel of Record*

BRENT WILSON
SHARON P. MORGAN
WILLIAM DEVENEY
ELARBEE, THOMPSON, SAPP & WILSON, LLP
800 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 582-8427

Attorneys for Petitioner Vernon Jones

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In a case involving multiple plaintiffs and multiple defendants, can a public official who is sued in his/her individual capacity under 42 U.S.C. § 1983 for hostile work environment, constructive discharge and/or retaliatory termination be denied qualified immunity based on the alleged aggregated conduct of the other defendant officials as well as non-parties, rather than only on his/her own individual conduct?

PARTIES TO THE PROCEEDINGS

Petitioners are Vernon Jones, Marilyn Boyd Drew, Morris Williams and Richard Stogner. Each petitioner is a local government official who is sued in his or her individual and official capacities. Respondents are Michael Bryant, John Drake, Becky Kelley and Herbert Lowe. There is no parent or subsidiary company of any party to be listed and therefore no corporate disclosure statement as otherwise required by S. Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

Vernon Jones, Richard Stogner, Morris Williams and Marilyn Boyd Drew respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals, App. 1-57, *infra*, is reported at 575 F.3d 1281. The decision of the district court, App. 58-172, *infra*, denying in part petitioners' motions for summary judgment on grounds of qualified immunity, is reported at 464 F. Supp. 2d 1273.

JURISDICTION

The court of appeals' judgment was entered on July 31, 2009, App. 1, *infra*. Timely petitions for rehearing and rehearing *en banc* were denied on October 5, 2009, App. 173-74, *infra*. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section one of the Fourteenth Amendment to the United States Constitution (the Equal Protection Clause), 42 U.S.C. § 1981 and 42 U.S.C. § 1983 are reproduced in the Appendix, App. 175-77, *infra*.

STATEMENT OF THE CASE

This is a public sector race discrimination and retaliation case brought by four plaintiffs against five public officials pursuant to 42 U.S.C. § 1983. Plaintiffs' claims all relate to their employment with DeKalb County, Georgia. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343 (3)-(4).

In affirming the denial of qualified immunity to each petitioner (four of the five defendants in this lawsuit), the Eleventh Circuit Court of Appeals analyzed petitioners' alleged conduct collectively, rather than separately analyzing each individual's conduct to determine whether that individual petitioner had, by his or her own acts, forfeited the protection of qualified immunity. The Eleventh Circuit's group-based qualified immunity analysis is directly contrary to this Court's ruling in *Ashcroft v. Iqbal*,[1] conflicts

[1] 129 S. Ct. 1937 (2009). Petitioners brought *Iqbal* to the court's attention twice but the opinion makes no reference to it.

with the qualified immunity analysis employed in other circuits, and undermines the essential purpose of qualified immunity – to protect a public official who acts reasonably from the burdens of litigation, trial and personal liability.

Petitioners are Vernon Jones, the Chief Executive Officer of DeKalb County, Georgia; Richard Stogner, County Executive Assistant; Morris Williams, an Assistant County Administrator; and Marilyn Boyd Drew, Director of the Parks and Recreation Department.[2] Petitioners Jones, Williams and Drew are black. Stogner is white. While each was sued in both his/her individual and official capacities, this petition concerns only petitioners' assertions of qualified immunity on respondents' individual capacity claims.

Respondents were employees of DeKalb County's Parks and Recreation Department ("Parks Department").[3] Respondents Becky Kelley (previously Department Director), John Drake (Assistant Director), and Michael Bryant (Deputy Director), are white. Kelley, Drake and Bryant claim they were subjected to a racially hostile work environment and that

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[2] None of the petitioners is presently employed by DeKalb County, with the exception of petitioner Morris Williams, who now holds a different job. The district court dismissed Joe Stone, the fifth defendant, from the case. Stone is not a party to this petition.

[3] None of the respondents is presently employed by DeKalb County.

Kelley was constructively discharged as part of an alleged conspiracy to rid the County of upper level white managers.[4] Respondent Herbert Lowe, Deputy Director of Strategic Management and Development, is black. He claims he was terminated in retaliation for refusing to participate in the alleged scheme and "dig up dirt" on white managers in the Parks Department.

A. Respondents' Lawsuit

Respondents filed suit in August 2004, bringing claims pursuant to 42 U.S.C. § 1983 (for violation of the Equal Protection Clause, the First Amendment and/or statutory rights under 42 U.S.C. § 1981) and a claim for conspiracy under 42 U.S.C. § 1985. On motions for summary judgment the district court denied the petitioners qualified immunity on Kelley's hostile work environment and constructive discharge claims against Jones, Stogner and Williams; Bryant and Drake's hostile work environment claim against Jones, Stogner, Williams and Drew; and Lowe's retaliatory discharge claim against Stogner and Drew.[5] On interlocutory appeal the Eleventh Circuit

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[4] The district court dismissed the conspiracy claim, yet both it and the court of appeals analyzed the qualified immunity defense as if the acts of each defendant, as well as nonparties, could be attributed to the other defendants.

[5] The district court granted the motions for summary judgment on the § 1985 conspiracy claim and on certain of the respondents' other § 1983 claims. App. 171-72, *infra*.

Court of Appeals affirmed the denial of qualified immunity.

B. Pertinent Facts

This Petition presents a legal question regarding the proper analysis to be applied in determining whether an official should be granted qualified immunity in a multi-plaintiff/multi-defendant § 1983 race discrimination case. Because the court of appeals refused to conduct an individualized analysis of the alleged conduct of each petitioner as to each respondent, the facts set forth in this section were generally omitted from the court's opinion. They are provided here to show why the analysis applied by the court of appeals is contrary to this Court's qualified immunity jurisprudence as set forth in *Iqbal* and in effect eliminates the benefit of qualified immunity in multi-party cases.

1. Parks Department Reorganization and Personnel Changes

Petitioner Jones took office on January 1, 2001 as DeKalb County's Chief Executive Officer ("CEO").[6] "Typical of administration changes in government, a number of organizational and reporting structure changes occurred when Jones become [sic] the CEO."[7]

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[6] App. 3, *infra*.

[7] App. 60, *infra*.

Prior to Jones' election, DeKalb County had an outside consultant study the Parks Department and make recommendations for its future.[8] Among other things, the study concluded that the Parks Department was in a "downward spiral" and needed a new organizational structure.[9] Shortly after Jones took office as CEO, DeKalb County voters authorized 125 million dollars in Parks and Greenspace General Obligation Bonds and additional state funds became available for the County to purchase greenspace.[10] Petitioner Stogner developed a plan to use these funds and Jones then signed an executive order that reorganized the Parks Department in February 2002.[11] Respondent Kelley, who had been Director of the Parks Department, was transferred to administer the County's new Greenspace Bond Program.[12] Respondent Drake received a lateral transfer to the Parks Department as Assistant Director.[13]

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[8] A Comprehensive Strategic Plan report was issued in September 2000. *See* Eleventh Circuit Record on Appeal (hereinafter referred to as "Record") Vol. 16, No. 265, Ex. 2.

[9] Record Vol. 16, No. 265, Ex. 2 at SS05584, SS05718.

[10] *Id.* at Vol. 17, No. 273, at 63.

[11] *Id.* at Vol. 16, No. 265, Ex. 6; App. 64, *infra*.

[12] Record Vol. 16, No. 265, Ex. 7 (stating in her resume that her duties were to "[o]versee and administer DeKalb County's $130 million parks bond program and DeKalb's 10-year, multi-million dollar community Greenspace Program").

[13] Neither Kelley nor Drake's transfer resulted in any reduction in their salary, benefits or status as a merit system

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Kelley (who asserts that she was constructively discharged) had been applying for jobs in other states since before Jones took office.[14] In July 2002, after being approached by the Commissioner of the Georgia Department of Natural Resources, Kelley applied for a position with the state.[15] When offered the position, Kelley "debated a long time" because she "did not want to leave DeKalb County."[16] Kelley resigned on September 25, 2002 to take a position with the state as Director of Parks, Recreation and Historic Sites.[17]

2. Petitioner Vernon Jones

Respondents Kelley, Drake and Bryant claim that Jones subjected each of them to a racially hostile work environment that, with respect to Kelley, resulted in her constructive discharge. However, Jones did not supervise Kelley's day-to-day work activities. While Director of the Parks Department, Kelley reported to petitioner Stogner through petitioner (then Assistant County Administrator) Williams. While assigned to the Greenspace Program, Kelley reported to Stogner through Assistant County Administrator

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employee. App. 64, 68, *infra*. Drake's transfer resulted in a salary increase. App. 68, *infra*.

[14] Record Vol. 17, No. 273, at 61-62.

[15] *Id.* at Vol. 8, No. 164, at 134-37 and Vol. 17, No. 273, at 72.

[16] *Id.* at Vol. 8, No. 164, at 137.

[17] App. 8, *infra*; Record Vol. 16, No. 265, Ex. 9.

Tina Arbes, who is white and was not sued.[18] Jones also never supervised Bryant or Drake (mid-level managers in the Parks Department) and he had little, if any, interaction with them. Bryant and Drake reported to petitioner Drew, who reported to petitioner Stogner through Williams.[19] Neither Bryant, Drake nor Kelley ever complained to Jones about a racially hostile work environment.

3. Petitioner Richard Stogner

Stogner served as the County's Executive Assistant beginning January 1, 2001. Kelley claims that Stogner subjected her to a racially hostile work environment that ultimately led to her constructive discharge. Specifically, Kelley claims that her work assignments in the Greenspace Bond Program were not meaningful, her suggestions were not implemented by her supervisor Tina Arbes and Stogner, and that Stogner told her on one occasion prior to her transfer to the Greenspace Program that she "could not relate to powerful black men."[20]

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[18] Record Vol. 16, No. 265, Ex. 6.

[19] App. 116-17, *infra*.

[20] App. 6-8, *infra*; Record Vol. 8, No. 164, at 71-73. Stogner's reasons for recommending that Kelley be moved to the Greenspace Bond Program (to be in charge of developing land acquisition criteria and identifying land to be acquired) are not referenced by the court of appeals. *See* App. 7, *infra*. Stogner believed that Kelley's expertise and skill set was in the area of conservation and parks development, not in recreational

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Bryant and Drake also assert a hostile work environment claim against Stogner. Stogner did not supervise Bryant or Drake, he was not involved in their day-to-day activities, and he was not involved in any of the actions they claim created a hostile work environment.[21] Bryant and Drake never complained to Stogner about the alleged hostile work environment.[22] While Respondent Lowe claimed there was a conspiracy among the petitioners to discriminate against upper level white managers, Lowe specifically

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services. Record Vol. 8, No. 175, at 52-58. Kelley also had good relationships with a number of conservation organizations that would be beneficial in attracting additional funds for greenspace. *Id.*

[21] App. 8-11, 25-26, *infra*. Indeed, Bryant testified that he makes no claim that Stogner discriminated against him on account of his race, yet the court of appeals denied Stogner qualified immunity on Bryant's claim. Record Vol. 8, No. 170, at 388-89.

[22] Respondent Bryant filed an internal EEO complaint against petitioner Drew in July 2003 alleging that she had discriminated against him on the basis of sex, age and race and created a hostile work environment. App. 67 n.5, *infra*; Record Vol. 16, No. 265, Ex. 15 at SS03090-3097. Bryant's complaint was investigated by the County's EEO Manager who interviewed all of the County employees that Bryant had listed as potential witnesses (including Respondent Drake) with the exception of respondent Lowe who refused to be interviewed. App. 67 n.5, *infra*. The EEO Manager concluded that there was no basis for Bryant's complaint. *Id.* Stogner received the EEO Manager's report and concluded that it fully and adequately addressed Bryant's complaint. *Id.*

did not contend that Stogner was part of the alleged conspiracy or even had knowledge of it.[23]

4. Petitioner Morris Williams

Williams held the position of Assistant County Administrator beginning in 1997 (four years before Jones took office).[24] As such, he had general oversight of the Parks Department and several other departments as requested by the Executive Assistant.[25] Kelley asserts a hostile work environment and constructive discharge claim against Williams, although Williams had no supervisory authority over Kelley during her tenure in the Greenspace Bond Program.[26] Kelley reported to Williams when she was Director of the Parks Department, and she claims that Williams allegedly ignored her suggestion in 2001 that a white candidate be selected for the position of Deputy Director in the Parks Department instead of Petitioner Drew.[27] Kelley also claims that Williams spoke

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[23] *See, e.g.,* Record Vol. 1, No. 1, at 8-10 (Complaint); Vol. 8, No. 163, at 348-49 (Lowe's deposition); Vol. 16, No. 265, at Ex. 22 (Lowe's written statement); Vol. 17, No. 272, Ex. C at 3-4 (Lowe's affidavit); Vol. 17, No. 272, Ex. 6 at 5-11 (Lowe's interrogatory responses). Lowe's testimony is the only evidence of the alleged conspiracy.

[24] Record Vol. 15, No. 264, Ex. C at 2.

[25] *Id.* at Vol. 8, No. 176, at 19-22.

[26] *Id.* at Vol. 16, No. 265, Ex. 6.

[27] App. 24, *infra*. The court of appeals' reference to this alleged act by Williams as evidence of a hostile work environment or constructive discharge is perplexing given that Kelley

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directly with Drew (when Drew was Deputy Director of Recreation Services) on occasion rather than going through Kelley. Neither the court of appeals nor the district court identified any act of discrimination or misconduct of Williams directed towards Kelley.

Bryant and Drake also assert hostile work environment claims against Williams. Williams had no direct supervisory authority over Bryant or Drake.[28] Bryant and Drake do not identify any act or conduct of Williams that created a hostile work environment as to them nor do they assert that Williams ever said or did anything towards them of a racially hostile nature.[29]

5. Petitioner Marilyn Boyd Drew

Respondent Kelley hired petitioner Drew in April 2001 as the Parks Department's Deputy Director of Recreation Services.[30] In February 2002, Drew was named Acting Director of Parks as part of the overall plan to implement the Greenspace Bond Program,

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testified that she considered Drew *to be the top candidate* for the position. Record Vol. 8, No. 164, at 59 ("Am I correct – that you considered Marilyn Boyd Drew to be the top candidate for the position of deputy director of parks and recreation? A. Yes.").

[28] Record Vol. 15, No. 264, Ex. C at 8.

[29] *See* App. 25-26, *infra*.

[30] Record Vol. 8, No. 164, at 174 ("I hired Ms. Drew.").

and she was promoted to the Director position in March 2002.[31]

Respondents Bryant and Drake reported to Drew and each asserts a hostile work environment claim against her. Bryant and Drake disliked Drew's management style and her decision to change their work assignments following staffing changes associated with the Greenspace Bond Program. Among other things, Bryant was assigned temporary responsibility for leadership of the Recreation Services Division, a role he had held before on a temporary basis when Respondent Kelley was Director.[32] The location for this position was later moved from the central office to the Tucker Recreation Center.[33] While Bryant contends this was evidence of a hostile work environment, he had previously recommended just such a move.[34] Respondent Drake assumed responsibility for the Revenue Management and Support Services Division.[35] These changes in work assignments had no impact on Bryant or Drake's salaries, benefits, or status as merit system employees.[36] As with the other petitioners, neither Bryant nor Drake

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[31] *Id.* at Vol. 15, No. 264, Ex. B at 2.

[32] App. 65, *infra*; Record Vol. 16, No. 265, Ex. 14 and Vol. 8, No. 169, at 225.

[33] App. 66, *infra*.

[34] Record Vol. 8, No. 169, at 225-26.

[35] *Id.* at Vol. 16, No. 265, Ex. 14.

[36] App. 65, *infra*; Record Vol. 8, No. 168, at 248.

claims that Drew directed any racially hostile words or acts toward them.[37]

Respondent Lowe became employed by the Parks Department as Deputy Director, Strategic Management and Development on September 16, 2002 (one week before respondent Kelley submitted her resignation).[38] Lowe claims petitioners Jones, Drew and Williams (and former defendant Stone who was dismissed from the case) asked him to participate in a scheme to discriminate against upper level white managers.[39] Lowe claims that he refused to participate, but he did not, during his employment, warn any white managers that he was concerned about the existence of discrimination.[40] In April or May 2003, Lowe was reassigned, at his own request, from the Parks Department to the CEO's office.[41] After that point, he no longer received his work assignments from Drew.

In the County's proposed 2004 budget, Stogner recommended abolishing the position of Deputy Director, Strategic Management and Development. The only evidence regarding Drew's involvement in this decision was Stogner's testimony that he discussed whether the position was needed with

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[37] App. 109, *infra*.

[38] App. 70, *infra*.

[39] App. 70-72, *infra*.

[40] *Id.*

[41] App. 72, *infra*.

Lowe's then-supervisor (Ann Kimbrough, the CEO's Chief of Staff) and petitioner Drew, who both told Stogner that the position was no longer needed.[42] After the Board of Commissioners approved the budget eliminating that position, Lowe was offered another County position, which he declined.[43] Lowe appealed the abolition of his position through the County merit system, but then failed to appear at his hearing. While petitioner Drew was not the decision-maker with respect to the abolishment of the position Lowe held, she was denied qualified immunity on Lowe's retaliatory discharge claim.

C. The District Court's Qualified Immunity Analysis

In determining whether petitioners were entitled to qualified immunity, the district court considered the acts of all petitioners, and various non-defendants, collectively. In doing so, the court explicitly applied the doctrine of respondeat superior to respondents' § 1983 claims. For example, with respect to petitioner Stogner, the court found that the alleged acts of all defendants were attributable to him for purposes of qualified immunity based on the following reasoning:

> The record evidence is that Stogner is Jones's Executive Assistant, and that Defendant

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[42] Record Vol. 8, No. 175, at 111-13.

[43] *Id.* at Vol. 8, No. 162, at 185-89.

> Williams, who is an Assistant County Administrator with direct supervisory authority over the Parks and Recreation Department, reports to Stogner. Although Stogner's exact relationship or authority over Williams is unclear, that Williams reports to Stogner, indicates that Stogner has some degree of formal or practical supervisory authority over Williams and the Parks Department.[44]

D. The Court of Appeals' Decision

Relying on the district court's recitation of respondents' version of the facts, the Eleventh Circuit affirmed with respect to the denial of qualified immunity and reversed on Stogner's claim of legislative immunity on Lowe's retaliatory discharge claim.[45] In analyzing whether petitioners were entitled to qualified immunity, the court refused to conduct an individualized analysis of petitioners Stogner, Williams and Drew's alleged conduct with respect to each

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[44] App. 118, *infra*. This analysis is particularly disturbing given the fact that the respondents do not allege that Stogner was a participant in the alleged scheme.

[45] App. 55, *infra*. The court of appeals chose not to cite undisputed facts favorable to the defendants. *See Scott v. Harris*, 550 U.S. 372, 381 & n.8 (2007) (stating that on summary judgment a court should draw all inferences in favor of the nonmoving party "*to the extent supportable by the record*") (emphasis in original). The "facts" stated in its opinion "largely track those recited by the district court," App. 3 n.3, *infra*, and the district court's opinion predominantly restates the statement of facts submitted by the plaintiffs, App. 74 *infra* ("The account set out in this section sets forth Plaintiffs' version of the facts in this case.").

respondent's claims.[46] Instead, the court applied the same aggregated and generalized approach applied by the district court, holding each petitioner personally liable for the alleged actions of all petitioners (and for other non-defendants as well).

Both explicitly and implicitly, the Eleventh Circuit analyzed petitioners' personal liability under § 1983 as if it were analyzing the liability of an employer under Title VII and not a public official's individual claim of qualified immunity from personal liability. For example, the court relied on an organizational chart it created to show the chain of supervisory responsibility and used raw, unanalyzed County-wide hiring data as evidence of racial motive.[47] Although respondents admitted that no petitioner ever directed any racial slur, epithet or comment towards them, the court cited a stray comment by a non-party County Commissioner to an unidentified third party as support for the alleged racial hostility in County government generally:

> As an example of the general racial hostility aimed at Kelley specifically and whites in

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[46] The district court's improper aggregated qualified immunity analysis was one of petitioners' primary arguments on appeal. *Ashcroft v. Iqbal* was decided while the case was pending and petitioners submitted it to the court of appeals as supplemental authority in support of their argument that the district court had applied an improper aggregated qualified immunity analysis. The court's opinion ignores *Iqbal*. Petitioners' request for rehearing based on *Iqbal* was also denied.

[47] App. 12 n.16, 74 n.8, *infra*.

> general, in the DeKalb County government, a County Commissioner revealed to a colleague that he "was not going to work with that little white woman [Kelley]."[48]

For petitioner Jones only, the court of appeals considered, under a pre-*Iqbal* theory of "supervisory liability", whether his alleged acts were the "proximate cause" of the hostile work environment alleged by Kelley, Bryant and Drake, and Kelley's constructive discharge.[49] Applying the analysis used for vicarious supervisor liability, as opposed to a § 1983 qualified immunity analysis, the court held that Jones' alleged actions "spawned" respondents' claims and he was therefore not entitled to qualified immunity.[50] The court of appeals' qualified immunity analysis completely disregards this Court's requirement that in a § 1983 action the official can only be held liable for his or her own conduct and supervisory liability is inapplicable.

REASONS FOR GRANTING THE PETITION

This case presents a critically important question: may a public official sued under § 1983 in his or

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[48] App. 6 n.6, *infra*. Kelley does not contend that any petitioner had any involvement whatsoever in this alleged conversation. Record Vol. 8, No. 164, at 71-73.

[49] App. 29-31, *infra*.

[50] *Id.*

her individual capacity be denied qualified immunity (and subjected to personal liability) based on the alleged conduct (or collective conduct) of other officials, including non-parties, rather than based on his or her own acts? Under this Court's decision in *Ashcroft v. Iqbal*, which held, in part, that a public official "is only liable for his or her own misconduct,"[51] the answer should be a resounding "No."

This case is worthy of certiorari because in conducting the qualified immunity analysis the Eleventh Circuit refused to conduct an individualized examination of each petitioner's alleged acts in relation to each respondent's claims. From the first sentence of the opinion[52] to the appendix,[53] the Eleventh Circuit analyzed the four petitioners' claims of qualified immunity as if it were analyzing a claim against an employer that could be held vicariously liable for the acts of its agents.[54] However, the qualified immunity

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[51] 129 S. Ct. 1937, 1949 (2009).

[52] "In 2001, *DeKalb County, Georgia* embarked on a wholesale plan to replace its white county managers with African Americans." App. 1-2, *infra* (emphasis added).

[53] The appendix to the Eleventh Circuit's opinion is a partial organizational chart of the County created by the court titled "DeKalb County Government Hierarchy." App. 55-57, *infra*. The court also relied upon raw County-wide employment data as corroboration of each individual defendant's alleged racial motive. App. 12 & n.16, *infra*.

[54] For example, Title VII's definition of "employer" includes agents, thus an employer may be held vicariously liable for their acts. *Pa. State Police v. Suders*, 542 U.S. 129, 144 (2004).

analysis involves only the individual liability of a government official, not employer liability.[55] Whether the employer, in this case DeKalb County, may be held liable is not relevant to the determination of whether an individual public official is entitled to qualified immunity from personal liability. The Eleventh Circuit's approach to qualified immunity in this multi-party case is directly contrary to this Court's decision in *Iqbal*.[56]

The question presented here is worthy of certiorari because it is of critical practical importance. In an effort to cast the widest net, § 1983 cases often involve individual capacity claims against multiple officials, in addition to claims against the municipality (or official capacity claims) in the same lawsuit. This is particularly true in § 1983 discrimination cases alleging hostile work environment where plaintiffs often name public officials not directly involved in supervising the work place. The analysis applied by the court of appeals effectively eliminates the qualified immunity defense in a multi-plaintiff/multi-defendant case because it denies the public

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[55] The qualified immunity analysis is the same regardless of the nature of the § 1983 claim. "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). Here, the claims are for hostile work environment based on race, constructive discharge and retaliatory discharge.

[56] S. Ct. R. 10(c).

official an individualized consideration of his or her own alleged conduct. In other words, under the Eleventh Circuit's analysis, a plaintiff can dilute the qualified immunity defense to the point of non-existence merely by adding defendants or plaintiffs to the case or even, as happened in this case, by adding allegations of wrongful conduct by non-parties to the suit. The official is then subjected to ongoing judicial proceedings, and possibly to a trial and potential personal liability when he or she, *through his or her own actions*, did not violate any constitutional or statutory rights. If the Eleventh Circuit's analysis stands, then officials who act in a reasonable manner have no assurance whatsoever that they will not be held personally liable (or at least forced to endure litigation and trial) despite their own reasonable conduct. As a result, local government in particular will be hindered in its ability to recruit and retain quality individuals into public service.

A. Certiorari Is Warranted Because The Eleventh Circuit's Qualified Immunity Analysis Directly Conflicts With This Court's Decision In *Ashcroft v. Iqbal*

Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In *Ashcroft v. Iqbal*, this Court

held that the factual allegations against two government officials (among several officials sued in the case) were insufficient to show that either had deprived the plaintiff of clearly established rights.[57] The qualified immunity analysis applied by the Eleventh Circuit in this multi-plaintiff/multi-defendant case directly conflicts with two key holdings in *Iqbal*:

First, personal liability under § 1983 is just that, *personal*. Therefore, it attaches based only upon the conduct of the person who is being sued in his or her individual capacity. A plaintiff must plead (or show, depending on the procedural posture of the case)[58] "that *each* Government-official defendant, through the official's *own individual actions*, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948 (emphasis added); *see also id.* at 1944 ("The allegations against petitioners are the only ones relevant here.").

Second, an individual may not be held personally liable under § 1983 based on his or her place on an organizational chart.[59] "Government officials may not

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[57] While *Iqbal* involved claims brought under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), its holdings govern § 1983 actions as well. *See Hunter v. Hydrick*, 129 S. Ct. 2431 (2009) (vacating and remanding § 1983 action for further consideration in light of *Iqbal*).

[58] *See Pearson*, 129 S. Ct. at 815-16 (one prong of the qualified immunity test is "whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right").

[59] The court of appeals' reliance on petitioners' placement on an organizational chart in its qualified immunity analysis is

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be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 129 S. Ct. at 1948. "[E]ach Government official, his or her title notwithstanding,[60] is only liable for his or her *own misconduct*." *Id.* at 1949 (emphasis added). In a § 1983 action vicarious liability is inapplicable and "the term 'supervisory liability' is a misnomer." *Id.* at 1949.[61]

Iqbal made explicit what this Court's prior qualified immunity decisions *presumed*, namely that the qualified immunity test is to be applied solely to the conduct of the individual asserting immunity. *See, e.g., Pearson v. Callahan,* 129 S. Ct. 808, 819 (2009)

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apparent from the opinion's Appendix, which is an organizational chart created by the court. App. 55-57, *infra*. The district court also explicitly relied on petitioners' positions, rather than their actions. *See* App. 112-19, *infra*.

[60] *See Anderson*, 483 U.S. at 642-43 (noting that the Court has been "unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated").

[61] As Justice Souter stated, "Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability, it is eliminating *Bivens*' supervisory liability entirely." *Id.* at 1957 (Souter, J., dissenting); *Robinson v. Pack*, 679 S.E.2d 660, 669 (W.Va. 2009) ("As it stands today, the issue of supervisory liability in connection with an alleged civil rights violation is clear: there is none."). Before *Iqbal*, "[t]he nature of [ ] supervisory liability theory [was] that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates . . . " 129 S. Ct. at 1957 (Souter, J., dissenting). "[I]t is this very principle that the majority reject[ed]." *Id.*

(the court must assess "whether the *defendant's conduct* violated the Constitution") (emphasis added); *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (the court must determine "whether it would be clear to a reasonable officer that *his conduct* was unlawful in the situation *he confronted*") (emphasis added). In a case involving multiple individuals, it is impossible to determine whether the official's actions violated the Constitution or whether the right allegedly violated was "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right," *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added), without an individualized assessment of *who* did *what* and to *whom*.

The question presented warrants certiorari because the non-individualized analysis applied by the Eleventh Circuit in this multi-party case erodes the very purpose of qualified immunity. "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 129 S. Ct. at 815. The immunity is "intended to provide government officials with the ability 'reasonably [to] anticipate when *their conduct* may give rise to liability for damages.' Where that rule is applicable, officials can know that they will not be held personally liable as long as *their actions* are reasonable in light of current American law." *Anderson*, 483 U.S. at 646 (citation omitted) (emphasis added). Moreover, applying the

proper qualified immunity analysis at the summary judgment stage[62] is critical because the immunity is "'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier*, 533 U.S. at 200-01 ("The privilege is 'an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial.'") (emphasis in original) (citations omitted).

Here, the Eleventh Circuit, without any reference whatsoever to *Iqbal*, applied a qualified immunity analysis in this multi-plaintiff/multi-defendant case that is directly contrary to *Iqbal* and inconsistent with previous decisions of this Court (and inconsistent with the analysis applied by at least four other courts of appeals, *infra*). This case is worthy of certiorari as it is a prime example of how qualified immunity is effectively lost in a case involving the actions of multiple individuals when the court refuses to consider the conduct of each person asserting immunity independently.[63] Rather than examine the claims of each respondent against the alleged conduct of each petitioner (whose interactions with respondents varied greatly in nature and frequency), the court held each individual vicariously liable for the

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[62] *Pearson*, 129 S. Ct. at 815 ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

[63] The district court has scheduled this case for trial on March 22, 2010. A motion for a stay has been filed contemporaneously with this Petition.

alleged acts of other individuals (their subordinates, their superiors, and other officials who are not even a party to this lawsuit).[64] For example, the Eleventh Circuit identified no facts at all that would support a finding that petitioner Stogner interacted with respondent Bryant (a mid-level manager in the Parks Department), much less that Stogner personally created a severe or pervasive hostile work environment for Bryant.[65] The Eleventh Circuit similarly

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[64] In analyzing Kelley, Drake and Bryant's § 1983 hostile work environment claims against petitioners in their individual capacities the court quoted the elements of proof from a Title VII case against an employer, including that the employee must prove "that the employer is responsible for [the discriminatorily abusive working] environment under either a theory of vicarious or of direct liability." App. 22, *infra* (quoting *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002)). However, "vicarious liability is inapplicable to *Bivens* and *§ 1983* suits." 129 S. Ct. at 1948. In another example of the court's misapplication of Title VII principles, the court of appeals found that petitioners may not assert as a defense to Kelley's constructive discharge claim that she had unreasonably failed to avail herself of an employer-provided preventative or remedial apparatus. App. 28, *infra*. Whether her employer may assert such a defense is wholly irrelevant to petitioners' qualified immunity.

[65] No individual petitioner's acts come even close to establishing the severe or pervasive hostile work environment described by this Court's and the Eleventh Circuit's own precedent. *See* App. 24-26, *infra*. For example, in a recent unpublished decision, the Eleventh Circuit found that evidence the plaintiff, who was African-American, was called "boy" on eight occasions over two years and that his supervisor commented about how to tie a noose around a person's neck did not constitute severe or pervasive harassment because there were no threats of physical violence and he did not show that the racial comments interfered with his job performance. *Alexander v. Opelika City*

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identified no interactions between petitioners Jones or Williams and respondents Drake and Bryant, and it noted only one interaction between petitioner Stogner and respondent Drake. Nonetheless, under the Eleventh Circuit's group-based analysis, each petitioner was denied qualified immunity with respect to each respondent.

The proper question is whether Kelley put forth sufficient evidence that Jones created an actionable racially hostile work environment as to her, whether Kelley put forth sufficient evidence that Stogner created an actionable racially hostile work environment as to her, and so on as to each of respondents' claims against each petitioner. The Eleventh Circuit's refusal to conduct such an analysis effectively denied petitioners the benefit of qualified immunity. This Court should grant the petition to make it clear that the individualized qualified immunity test applies in multi-party cases and that public officials cannot be held potentially liable for the aggregated acts of others.

Schools, No. 08-11014, 2009 U.S. App. LEXIS 24686, at *6-7 (11th Cir. Nov. 10, 2009). Here, no respondent who alleges a hostile environment claim contends that any petitioner uttered any racially offensive remark in his/her presence, yet the Eleventh Circuit found that the everyday work place interactions constituted a "hostile environment."

B. The Eleventh Circuit's Qualified Immunity Analysis Is Inconsistent with the Analysis Applied by Other Courts of Appeals

At least four other courts of appeals, the First, Third, Fifth and Tenth Circuits, require an independent, individualized analysis of the conduct of each individual who is asserting qualified immunity. The First Circuit found that an individualized analysis is required by this Court's decision in *Iqbal*. The Third, Fifth and Tenth Circuits relied on this Court's pre-*Iqbal* decisions or general prudence concerns regarding the proper application of qualified immunity principles.

In *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009), the First Circuit applied *Iqbal* and reversed the district court's denial of qualified immunity to the Mayor of Barceloneta, Puerto Rico for § 1983 substantive due process claims related to the seizure and killing of pets at a public housing complex. As an initial matter, the court found that the district court had incorrectly focused on the acts of the "government officials" during the raids rather than *the specific facts alleged against the mayor seeking qualified immunity*. *Id.* at 273 n.5. Focusing only on the mayor's conduct, the court granted qualified immunity because there were no allegations that the mayor was *personally involved* in the unlawful conduct (despite having been present at one raid in which his policy prohibiting pets in government housing was enforced in an allegedly unlawful manner). The First Circuit found that allegations the mayor "supervised,

directly or indirectly, the agencies involved" were insufficient as he did not personally kill or direct the killing of any pets. *Id.* at 274.

The Third Circuit interpreted this Court's decisions in *Harlow*[66] and *Anderson*[67] as requiring an individualized analysis. *Grant v. City of Pittsburgh*, 98 F.3d 116 (3d Cir. 1996). The Third Circuit found that while *Harlow* set forth the test for qualified immunity, *Anderson* narrowed the focus of the test to apply to "the *official's specific conduct*, not just the right allegedly violated." 98 F.3d at 121 (emphasis added). For purposes of the first prong, this means that the district court must "analyze separately the conduct of each [defendant] against the constitutional right allegedly violated." *Id.* at 123. With regard to the second prong, "the question is whether a reasonable public official would know that his or her *specific conduct* violated clearly established rights." *Id.* at 121 (emphasis in original). The court noted that an individualized analysis "is critical, for it can mean the difference between immunity from suit and being held personally liable for money damages." *Id.*

This issue arose again in *Rouse v. Plantier*, 182 F.3d 192 (3d. Cir. 1999) (Alito, J.), in the context of a class action lawsuit seeking damages under § 1983. The Third Circuit found that the individual defendants were entitled to the same scope of qualified

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[66] 457 U.S. 800 (1982).

[67] 483 U.S. 635 (1996).

immunity afforded to a defendant in an individual damages action and therefore an individualized inquiry was required. *Id.* at 200. The court reasoned that if

> individual damages actions by plaintiff P1 against defendant D1 would not survive a motion for summary judgment based on qualified immunity, either because D1's alleged conduct did not constitute an Eighth Amendment violation as to P1 or because the illegality of D1's conduct was not clearly established at the time in question, then in the class action context D1 should likewise be free from the burden of going to trial on the claims of P1 and all other similarly situated members of the plaintiff class.

Id. at 199. Whether a particular defendant acted in an objectively unreasonable manner is a highly individualized inquiry, therefore each defendant's individual actions must be considered with respect to each plaintiff. *Id.* at 200-01.[68]

The Fifth Circuit also requires that the conduct of each individual who is asserting qualified immunity be considered independently, rather than collectively. *Meadours v. Ermel*, 483 F.3d 417, 421-22

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[68] The court must determine "whether a reasonable official in the position of *that defendant* would have known that *his or her actions* were unconstitutional in light of the clearly established law and the information *the official possessed*." *Rouse*, 182 F.3d at 200 (emphasis added).

(5th Cir. 2007) (noting that the court "consistently examine[s] the actions of defendants individually in the qualified immunity context" and finding that the district court erred in considering "the officers' actions collectively, because it found [that the officers] acted in unison"). In *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999), the Fifth Circuit analyzed whether three treating physicians and a prison medical director should be granted summary judgment on § 1983 claims that they had violated an inmate's Eighth Amendment rights through deliberate indifference to his medical needs. Each doctor asserted qualified immunity. The court held that (1) the doctors may not be held liable under § 1983 for the conduct of the nurses (who had not been sued) based on the theories of respondeat superior or vicarious liability, and (2) each doctor's actions must be viewed individually, rather than cumulatively, for purposes of determining whether each violated the plaintiff's constitutional rights. *Id.* at 536-37.[69] Applying this analysis to the Eighth Amendment violation alleged, the Court concluded that "the claimed independent acts of negligence by each physician were not sufficient to raise a material fact issue that each doctor knew that his acts or omissions subjected [the inmate] to an excessive risk of harm, yet responded to the risk with deliberate indifference." *Id.*

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[69] *See also Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 883-84 (5th Cir. 2004) (analyzing each defendant's conduct individually to determine whether they had violated the plaintiff's constitutional rights).

In *Robbins v. Oklahoma ex rel. Department of Human Services*, 519 F.3d 1242 (10th Cir. 2008) and *Bryson v. Gonzales*, 534 F.3d 1282, 1284 (10th Cir. 2008) the Tenth Circuit analyzed personal liability claims brought pursuant to § 1983 involving a variety of different alleged actions by multiple individuals. In both cases the Tenth Circuit reversed because the district court had failed to properly analyze whether the complaint had sufficiently alleged participation in the alleged wrongful conduct by the particular defendant in question. *Bryson*, 534 F.3d at 1284-85; *Robbins*, 519 F.3d at 1246. As the court explained:

> In § 1983 cases, defendants often include the government agency and a number of government actors sued in their individual capacities. Therefore, it is particularly important in such circumstances that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.

Robbins, 519 F.3d at 1249-50 (emphasis in original); *see also id.* at 1250 (finding that § 1983 complaint failed to differentiate between the acts of the various defendants and how each defendant might be held individually liable); *Bryson*, 534 F.3d at 1290 (rejecting allegations of conduct by "defendants" collectively).

The question presented here is worthy of certiorari because, in addition to being contrary to this Court's decision in *Iqbal* and inconsistent with

the purpose of qualified immunity, the non-individualized analysis applied by the Eleventh Circuit in multi-party cases is also inconsistent with the reasoned analyses applied by other courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT B. REMAR
Counsel of Record
KERRI A. GILDOW
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-4700

BRENT WILSON
SHARON P. MORGAN
WILLIAM DEVENEY
ELARBEE, THOMPSON, SAPP
& WILSON, LLP
800 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 582-8427

Michael BRYANT, John Drake, Becky Kelley, Herbert Lowe, Plaintiffs-Appellees,

v.

CEO DeKALB CO. Vernon JONES, Marilyn Boyd Drew, Morris Williams, Richard Stogner, in their individual capacities and in their official capacities, Defendants-Appellants,

Joe Stone, Defendant.

No. 06-16591.

United States Court of Appeals,
Eleventh Circuit.

July 31, 2009

Robert B. Remar, Kerri A. Gildow, Rogers & Hardin, LLP, Brent L. Wilson, Sharon P. Morgan, Elarbee, Thompson, Sapp & Wilson, LLP, Atlanta, GA, for Defendants-Appellants.

James Hollis, Michael J. Bowers, Christopher S. Anulewicz, K. Alex Khoury, Balch & Bingham, LLP, Atlanta, GA, John T. Morgan, III, Decatur, GA, for Plaintiffs-Appellees.

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, ANDERSON and COX, Circuit Judges.

TJOFLAT, Circuit Judge:

In 2001, DeKalb County, Georgia embarked on a wholesale plan to replace its white county managers

with African Americans. Three white managers, Becky Kelley, Michael Bryant, and John Drake, proceeding under 42 U.S.C. § 1983, sued the county's Chief Executive Officer, Vernon Jones, who devised the plan and monitored its execution, and three subordinates who assisted him, Marilyn Boyd Drew, Morris Williams, and Richard Stogner, for discriminating against them on account of their race in violation of 42 U.S.C. § 1981[1] and the Equal Protection Clause of the Fourteenth Amendment. A fourth manager, Herbert Lowe, an African American, also joined the suit, alleging that the defendants retaliated against him because he refused to assist them in carrying out Jones's plan of racial discrimination.

All defendants claimed as an affirmative defense that they were entitled to qualified immunity; Stogner additionally asserted that he was entitled to legislative immunity. The defendants moved the district court for summary judgment, basing their motions on these immunity defenses. The court denied the defendants' motions, and they appeal.[2] We

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[1] We have held that § 1981 does not provide an implicit cause of action against state actors; therefore, § 1983 constitutes the exclusive federal remedy for violation by state actors of the rights guaranteed under § 1981. *See Butts v. County of Volusia*, 222 F.3d 891, 894-95 (11th Cir. 2000).

[2] We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1291 and the collateral order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949) (holding that interlocutory review of non-final judgments is available where the order (1) conclusively determines the disputed question; (2) resolves

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now affirm the district court's rulings on qualified immunity but reverse the court's denial of Stogner's defense of legislative immunity.

I.

A.[3]

In November 2000, Vernon Jones was elected DeKalb County's Chief Executive Officer ("CEO").[4] Jones was both the youngest person elected as CEO of the county and also the first African American elected to the position. After assuming office on January 1, 2001, Jones publicly announced plans to make the employees of DeKalb County "look like DeKalb County." Jones later explained that this meant bringing a "darker administration" to "the new DeKalb County." To accomplish this goal, Jones and his administration implemented an aggressive

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an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment); *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985) (finding that district court's order denying a defendant's motion for summary judgment based on qualified immunity is an immediately appealable order).

[3] The facts provided here largely track those recited by the district court in its thoroughgoing opinion. *See Bryant v. Jones*, 464 F. Supp. 2d 1273 (N.D. Ga. 2006).

[4] In the appendix, we provide an organizational chart to assist in understanding the hierarchy of the DeKalb County government.

restructuring program of the county's government.[5] One part of this reorganization focused on the management of the county's Parks and Recreation Department ("Parks Department").

Jones's policy initiatives, which he specifically aimed at the Parks Department, were implemented by members of the county's senior management who were positioned either within DeKalb County generally or the Parks Department specifically. These managers included Richard Stogner, a white male who served as Jones's executive assistant; Morris Williams, a black male who served as an Assistant County Administrator; and Marilyn Boyd Drew, a black female who initially served as the Parks Department's Director of Recreation Services but was soon promoted to the position of Acting Director of the Parks Department and later named permanent director of the department.

At the time Jones assumed office, Becky Kelley, a white female who had been employed by DeKalb County since 1976, was Director of the Parks Department – a position she had held since 1992. Kelley exercised authority over the department's operations and programs. Michael Bryant, a white male, was

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[5] Under DeKalb County's Organizational Act, the CEO is vested with exclusive authority to supervise and direct the administration of the county government, including the power to set hiring policy and abolish any department, agency, or office. *See* http://www.co.dekalb.ga.us/boc/pdf/ORGANIZATIONALACT.pdf (last visited June 25, 2009).

Deputy Director of Revenue Management and Support in the Parks Department, and he reported to Kelley. Bryant had served in the position since 2000. John Drake, a white male who was first employed by the county in 1975, was serving as the Assistant Director of the Purchasing and Contracting Department. Herbert Lowe, an African American male, was hired on September 16, 2002, as the Deputy Director of Strategic Management and Development of the Parks Department.

Kelley, Bryant, and Drake allege that, as a result of Jones's plan to create a "darker administration," they were discriminated against and exposed to a hostile work environment on account of their race. Jones's goal, they claim, was to force them to terminate their employment so he could replace them with African American managers. Lowe, on the other hand, claims that he refused to cooperate in Jones's plan to force out white managers, leading Jones and his administration to eliminate his job in retaliation.

B.

1.

During her nine years of service as Parks Department Director, Kelley had performed her duties without complaint. Kelley claims, however, that from the instant Jones became CEO he was openly hostile towards her. For instance, during a phone call, Jones became very angry and confrontational with her. On a second occasion, while in a private meeting in Jones's

office, Jones screamed at Kelley and approached her in a menacing way, leading her to fear that he was going to strike her.

Jones also began imposing restrictions on Kelley's job duties by prohibiting her from communicating with members of the press and DeKalb County's Board of Commissioners. When Kelley expressed concern over her treatment to Stogner, he replied that "she didn't understand the geopolitical issues in DeKalb County and that she could not relate to powerful black men."[6]

Kelley's job responsibilities were further limited when Jones prohibited her from interviewing employment candidates unless Williams was present. Consistent with this new policy, Kelley and Williams interviewed candidates for the position of Parks Department Deputy Director of Recreation Services. After conducting several interviews, Kelley, based on her years of experience in the Parks Department, determined that a white male was the top candidate. Williams, however, told Kelley that they could not recommend the candidate to Jones because Jones would not accept a white candidate for the position. Stogner later directed Kelley to recommend Drew, a less qualified African American candidate, for the

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[6] As an example of the general racial hostility aimed at Kelley specifically, and whites in general, in the DeKalb County government, a County Commissioner revealed to a colleague that he "was not going to work with that little white woman [Kelley]."

position so that Kelley could "get in good" with Williams. Drew was hired on April 30, 2001.

After Drew was hired, Jones and Williams continued to narrow the scope of Kelley's responsibilities by excluding her from all discussions and decisions regarding the operations of the Parks Department. Instead, Jones and Williams began to coordinate with Drew, who was Kelley's subordinate. Kelley was also excluded from participating in the Parks Department's hiring process. According to Stogner, Kelley was shut out of the Parks Department's decision making process because Jones wanted "to showcase black parks and showcase black employees."

Without warning or explanation, Jones issued an executive order on February 12, 2002, which Stogner drafted, removing Kelley as Parks Department Director and reassigning her to the county's Greenspace Program.[7] Jones then appointed Drew to serve as Acting Director of the Parks Department. Although Kelley's reassignment did not affect her salary or benefits, it did bring about a significant change in her duties and authority. For instance, Kelley had no title, and she reported to an Assistant County

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[7] The DeKalb County Greenspace Program is part of a statewide initiative to retain parks, natural preserves, and recreational centers for the purpose of curbing the deleterious effects of urban sprawl in and around the Atlanta region. *See* https://dklbweb.dekalbga.org/Greenspace/greenspace.asp (last visited June 12, 2009).

Administrator[8] rather than the CEO's office. Drew also attempted to move Kelley to a windowless office that had previously been used as a storage area.[9] While in the Greenspace Program, Kelley found that any input she offered concerning the program was ignored, causing her to conclude that she had no authority or responsibility – in fact, she described her job as "coloring maps."[10] On September 25, 2002, seven months after her reassignment, Kelley submitted her resignation, effective October 9, 2002.

2.

After Drew became Parks Department Director, Bryant alleged that she, at Jones's urging, began making numerous changes within the department that adversely affected him.[11] For instance, Drew began assigning Bryant, who served as the Deputy

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[8] It is unclear from the record whether Kelley continued to report to Williams or another Assistant County Administrator.

[9] Kelley objected to being moved into the new office space and was not moved.

[10] Kelley stated that she found the transfer "personally and professionally humiliating" and considered it a demotion. She asserted that she was "taken from a position of great stature and prominence and placed into a highly subordinate role where [she] moved from personally managing a $ 10 to $ 20 million [sic.] bond budget to having no financial oversight, from [having responsibility over 600 positions] to having quasi oversight over three people."

[11] Jones had previously stated that Bryant was a "white bastard who's nothing more than a racist and need[s] to go."

Director of Revenue Management and Support, duties ordinarily performed by the Deputy Director of Recreation Services. Also, in March 2002, after Bryant complained to Drew about what he considered to be excessive expenditures made by a black contractor who had been hired to perform services at the county golf course, Drew reassigned fiscal and contracting oversight for golf and tennis contracts from Bryant to Drake. Drew assigned operational responsibilities for golf and tennis contracts to Detrick Stanford, a black employee who reported to Drew.

Approximately sixty days after Drew changed Bryant's duties, she moved him from the Parks Department's primary office in Decatur to a satellite office in Tucker, Georgia. Bryant claims that he made numerous requests for personnel and equipment to assist him, but these requests were denied. Drew also excluded him from making decisions and participating in meetings concerning matters for which he was responsible while she sought greater input from African American managers. Drew also required Bryant and other white managers to schedule appointments if they wanted to meet with her while allowing African American managers open access.

During this time, Drew repeatedly threatened to terminate or suspend Bryant and drafted letters to that effect, which she left in plain sight for Bryant and others to see. She, however, never submitted the letters, and Bryant was never suspended or

terminated.[12] Bryant continues to serve as Deputy Director of Revenue Management and Support Services but only performs the limited duties assigned to him by Drew.[13]

3.

After Jones removed Kelley as Parks Department Director, he had Drake, who had been with DeKalb County for over twenty-five years, transferred from the Purchasing and Contracting Department, where he had been the Assistant Director, to the Parks Department, where he was again to serve as Assistant Director. Drake told Stogner that he was interested in becoming the new Parks Department Director, but

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[12] Before this lawsuit was brought, Bryant filed a hostile work environment complaint against Drew with the DeKalb County Human Resources Department. Bryant thereafter sent several e-mails to the County EEO Manager, Curtis LeBlanc, inquiring about the status of his complaint, but LeBlanc never responded. LeBlanc interviewed all the witnesses listed in the complaint, except Lowe, who refused to testify, apparently out of fear of retribution from the defendants. Nine months after Bryant filed the complaint, LeBlanc submitted his findings to Stone, Director of Human Resources. The report indicated some problems with respect to Drew and Bryant's relationship, but it did not conclude that the problems were racially based. Both Joe Stone and Stogner reviewed the report and concluded that no discrimination occurred. The Human Resources Department failed to contact Bryant to inform him of its decision.

[13] Marvin Billups, a black male, was hired as Deputy Director of Recreation Services in October 2003. However, Bryant continues to perform the tasks included within the Deputy Director of Recreation Services job description that Drew assigned him.

Stogner told him that, although he was qualified for the position, Drew, a black female, would be given the position because Jones had made "too many political commitments."[14] Jones and Stogner nevertheless wanted Drake transferred to the Parks Department to "prop up" Drew.[15]

After Drake's transfer to the Parks Department, Drew eliminated all of the duties that he would typically perform as Assistant Director, relegating him to performing tasks usually assigned to lower-level employees. Drew also modified the organizational hierarchy by requiring Deputy Directors to report directly to her rather than Drake. Drew also removed Drake as the Parks Department's representative to the county bond program group, of which he had been a member since 1986, and excluded him from discussions concerning the department's operations. Drake continues to work as Assistant Director of the Parks Department.

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[14] In fact, Jones prevented Drake from competing for the position of Director of the Parks Department. Jones accomplished this by designating the position as an intra-departmental promotion, meaning only Parks Department employees could apply. And, because February 25, 2002 to March 8, 2002 was the designated application period, Jones made Drake's transfer effective March 16, 2002; as such, Drake, as an employee of the Purchasing and Contracting Department, could not apply for the position until eight days after the application period had ended.

[15] Stogner admitted that he did not carefully review Drew's qualifications. He did not call any of her references, and he could not recall whether he so much as looked over her resume.

4.

Lowe, an African American male and, at one time, a personal friend of Jones, began working as the Parks Department's Deputy Director of Strategic Management and Development on September 16, 2002. Lowe claimed that he was told by Joe Stone, DeKalb County's Director of Human Resources and an African American, that Jones was aggressively seeking to increase the number of African American managers in the county.[16] According to Lowe, Stone further revealed that, pursuant to Jones's edict, white applicants would never be considered for Lowe's position and that "white folks" were generally ineligible for positions in DeKalb County. Lowe stated that Jones, along with Drew and Williams, informed him of his broad plan to eliminate white managers and replace them with African Americans. Jones told Lowe that he wanted him to be a "team player." Detailing his plan, Jones revealed that "we don't fire people around here; we eliminate their position." When Drew welcomed Lowe to the Parks Department,

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[16] Statistically, Jones's plan seemed to be succeeding. When Jones became CEO in January 2001, there were 98 managerial employees at the county pay grade 33, which were positions over which the CEO had sole hiring authority. At that time, of those 98 managers, 61 were Caucasian and 33 were African American. Four years later, in August 2005, there were 122 managers at pay grade 33. Of those 122 managers, 58 were Caucasian and 60 were African American. Thus, the number of African American county managers almost doubled from 2001 to 2005, while the total number of Caucasian managers decreased slightly during the same time period.

she reiterated that Jones wanted white managers forced out of the department and replaced with African Americans, and she expressed her unequivocal support of Jones's policies and her intent to comply with his wishes.

Jones also sought Lowe's assistance in executing his agenda to create a "darker administration." During their conversations, Lowe claimed that Jones referred to Bryant as a "white bastard" and expressed his wish to force Kelley, Bryant, and Drake out of the Parks Department. Singling Kelley out, Jones stated that he wanted to eliminate her from the Parks Department because she had previously terminated African Americans and, in his view, had allowed white associations to control the parks. To accomplish Jones's goal of eliminating white managers, Drew instructed Lowe to "dig up dirt" on all white employees within the department and ensure that white employees were not placed in highly visible positions. In particular, Drew directed Lowe not to speak with Drake about important issues, hoping that, by keeping him in the dark, Drake would become frustrated and ultimately fail in his position. Drew also revealed to Lowe that she had transferred Bryant to a position for which he had no experience in the hopes that it would create the appearance that Bryant was incapable of performing his job. Another tactic Drew employed to further Jones's plan was to antagonize white managers during meetings; thus, there were several instances where Drew met with Lowe to discuss how she could frame issues and questions to

annoy and embarrass Bryant and Drake. In the end, according to Lowe, Jones, Drew, and Williams hoped that by creating a negative and hostile work environment for the white managers, and limiting their opportunities for responsibility and advancement, the white managers would resign.

Lowe refused to participate in the plan and failed to carry out any orders designed to discriminate against whites. Jones told Lowe that by refusing to assist in executing his plan he was not being a "team player" and did not fully appreciate and understand what Jones was trying to accomplish. Lowe reiterated that he did not want to be a part of Jones's scheme, and he requested a transfer out of the Parks Department. Lowe stated that if he was not reassigned, he would resign.

Soon after this exchange with Jones, Lowe was moved to an office in Jones's executive suite. While Lowe continued to work for the Parks Department, he also began working on several projects directly assigned to him by Jones. On July 23, 2003, Drew hired Marvin Billups, an African American, as the Parks Department Deputy Director of Strategic Management and Development, the same position held by Lowe. Billups's employment was characterized as "time-limited," meaning that the appointment was temporary. Because it was time-limited, the position did not have to be publicly advertised and was not open to a competitive hiring process. Before the position expired, Billups was named Deputy Director of Recreation Services. Despite the title change,

Billups continued to perform the same tasks typically assigned to the Deputy Director of Strategic Management and Development.

Jones later submitted to the County Board of Commissioners the 2004 proposed budget, which Stogner developed and drafted with Drew's assistance. A feature of the proposed budget was the elimination of funding for Lowe's Deputy Director position. On January 27, 2004, the Board of Commissioners approved the budget, and Lowe's position was dissolved. Out of 600 positions listed on the budget, Lowe's was the only position eliminated. Billups, who had been transferred out of the abolished position, continued working for DeKalb County performing the same tasks previously assigned to the Deputy Director of Strategic Management and Development but under the new job title of Deputy Director of Recreation Services. Soon thereafter, Stogner offered Lowe the position of Parks Maintenance Coordinator, a job that came with less responsibility and a lower salary. Lowe refused the offer and resigned.

Lowe appealed the Board's decision to eliminate his position to the DeKalb County Human Resources Department. Although he was provided a hearing, Lowe did not attend because Stone convinced him that there was "no use" to appeal.

C.

On August 24, 2004, Kelley, Bryant, Drake, and Lowe filed a six-count complaint against Jones, Drew, Stogner, and Williams.[17] Counts I, II, and IV, each brought under 42 U.S.C. § 1983, prayed for compensatory and punitive damages. Count I alleged that the defendants discriminated against Kelley, Bryant, and Drake on account of their race in violation of the Equal Protection Clause of the Fourteenth Amendment by subjecting them to hostile work environments, and, in Kelley's case, to a constructive discharge. Count II alleged that the discrimination Kelley, Bryant, and Drake sustained in Count I also infringed their rights under 42 U.S.C. § 1981. Count IV alleged that the defendants retaliated against Lowe, in violation of 42 U.S.C. § 1981, for refusing to participate in the defendants' scheme to discriminate against white managers.

The defendants individually answered the plaintiffs' complaint by denying liability and asserting as an affirmative defense that they were entitled to qualified immunity. Stogner, in responding to Count IV, also asserted legislative immunity as a defense. After discovery closed, the defendants separately moved for summary judgment, relying principally on

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[17] The defendants were sued in both their official and individual capacities. This appeal is limited to the claims brought against them in their individual capacities. The complaint also named Stone as a defendant. He has been dismissed from the case; hence, in referring to the defendants, we omit his name.

their qualified and legislative immunity defenses. In an order entered on November 10, 2006, the district court denied the defendants qualified immunity, stating that it did "not believe the law allows a public official defendant to engage in calculated racial discrimination costumed in a racially neutral garb of administrative actions so it can masquerade as a qualified immunity defense." The court also rejected Stogner's defense of legislative immunity.[18] We now consider the merits of the defendants' appeals.

II.

We review *de novo* a district court's ruling granting or denying qualified immunity, resolving all issues of material fact in favor of the non-moving party. *See Lee v. Ferraro,* 284 F.3d 1188, 1190 (11th Cir. 2002).[19]

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[18] The November 10 order also disposed of other issues not relevant here.

[19] Plaintiffs argue that we lack jurisdiction to consider the present appeal because the defendants have failed to offer an appealable issue of law; instead, according to the plaintiffs, the defendants merely argue that the record provides insufficient evidence to support plaintiffs' allegations. Plaintiffs' argument is incorrect, as the defendants advance an appealable issue. The issue of whether a defendant is entitled to qualified immunity is purely a legal question; as such, an appellate court reviewing a defendant's denial of qualified immunity considers the facts as presented by the plaintiff in the light most favorable to him, and juxtaposes that set of facts with relevant case law to determine whether those facts support a claim that defendant violated a right based on an earlier articulated ruling or clearly established

(Continued on following page)

A.

The doctrine of qualified immunity shelters government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); *see also Anderson v. Creighton,* 483 U.S. 635, 638-39, 107 S. Ct. 3034, 3038-39, 97 L. Ed. 2d 523 (1987); *Wood v. Kesler,* 323 F.3d 872, 877 (11th Cir. 2003). The doctrine "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."

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legal principle, or a principle so closely analogous to an established legal concept that we can conclude that the emanating right was itself "clearly established." *See Hope v. Pelzer,* 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Koch v. Rugg,* 221 F.3d 1283, 1296 n.28 (11th Cir. 2000) ("When we, like the district judge, view the facts for summary judgment purposes most favorably to the plaintiff, a pure issue of law is created.") (citation and quotations omitted). While the Supreme Court in *Johnson v. Jones,* 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), held that appellate courts do not possess jurisdiction over every interlocutory appeal based on a denial of qualified immunity, it narrowly defined the proscribed class of cases as those where a defendant merely contests the merits of the plaintiff's underlying action. *Id.* at 308, 115 S. Ct. at 2154. In other words, we do not have jurisdiction to entertain such appeals when the defendant's argument is merely, "I didn't do it." We are not here presented with such a case.

Pearson v. Callahan, 555 U.S. ___, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009).

To receive qualified immunity, the public official must establish that he was engaged in a "discretionary function" at the time he committed the allegedly unlawful act. *Holloman ex. rel. Holloman v. Harland,* 370 F.3d 1252, 1263-64 (11th Cir. 2004); *see* 1 H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 162 (Tent. Ed. 1958) ("Discretion" is "the power to choose between two or more courses of action each of which is thought of as permissible."). If the official demonstrates that he was engaged in a discretionary function, the burden shifts to the plaintiff to prove that the official is not entitled to qualified immunity. *Cottone v. Jenne,* 326 F.3d 1352, 1358 (11th Cir. 2003). This requires plaintiff to satisfy the two-part test prescribed by the Supreme Court in *Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Under *Saucier,* a plaintiff must first show that the defendant violated a constitutional right and then demonstrate that the constitutional right was clearly established at the time of the alleged wrongful act. 533 U.S. at 201, 121 S. Ct. at 2156. If a court, after viewing all the evidence in the light most favorable to the plaintiff and drawing all inferences in his favor, determines that the plaintiff has satisfied these two requirements, the defendant may not obtain qualified immunity. *Holloman,* 370 F.3d at 1264.

While *Saucier* mandated this two-part order of battle, the Supreme Court, upon realizing the

inefficiency of such an inelastic approach, recently retreated from this protocol, finding that "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson,* 129 S. Ct. at 818. The Supreme Court noted, however, that its "decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases." *Pearson,* 129 S. Ct. at 821.

In this case, the officials argue – with respect to each claim the plaintiffs asserted – that, as a matter of law, (1) they were engaged in a discretionary function when they committed the acts at issue, (2) the acts did not violate a statutory or constitutional right, and (3) if their acts did violate a statutory or constitutional right, the right was not clearly established at the time.

1.

We need not tarry long in resolving the first issue – whether defendants Jones, Williams, Drew, and Stogner were engaged in a discretionary function when they allegedly violated the plaintiffs' constitutional and statutory rights – as we note that the plaintiffs failed to raise the issue before the district

court; therefore, the issue is not properly before us. *See Johnson v. United States,* 340 F.3d 1219, 1228 n. 8 (11th Cir. 2003) ("Arguments not raised in the district court are waived."); *Hurley v. Moore,* 233 F.3d 1295, 1297-98 (11th Cir. 2000) (same).

Resolving the second and third issues, on the other hand, requires extended discussion. Our task is to determine whether the defendants' actions violated Kelley, Bryant, and Drake's federal rights, and, if so, whether those rights were clearly established. *See Wood v. Kesler,* 323 F.3d 872, 877 (11th Cir. 2003). We understand the defendants to argue that they are entitled to qualified immunity because, as a matter of law, Kelley, Bryant, and Drake failed to present sufficient evidence to establish that their federal rights to be free from racial discrimination in their employment were violated. Specifically, the defendants aver that Kelley, Bryant, and Drake failed to make out a hostile work environment claim and that Kelley failed to establish her constructive discharge claim. We turn first to the hostile work environment claims.

2.

To establish a hostile work environment claim under the Equal Protection Clause and 42 U.S.C. § 1981, an employee (or former employee) must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [his or her] employment." *Pa. State Police v. Suders,* 542 U.S. 129, 133, 124

S. Ct. 2342, 2347, 159 L. Ed. 2d 204 (2004). This requires that the employee prove the following:

> (1) that he [or she] belongs to a protected group; (2) that he [or she] has been subject to unwelcome harassment; (3) that the harassment [was] based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).[20]

The defendants concede the first element and focus on the next three, arguing that Kelley, Bryant, and Drake failed, as a matter of law, to show that the

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[20] We pause to note that discrimination claims, including hostile work environment claims, brought under the Equal Protection Clause, 42 U.S.C. § 1981, or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, are subject to the same standards of proof and employ the same analytical framework. *Tademy v. Union Pacific Corp.*, 520 F.3d 1149, 1170 (10th Cir. 2008) (citations omitted) ("The elements of a hostile work environment claim under § 1981 are the same as those under Title VII."); *Cross v. Alabama*, 49 F.3d 1490, 1507-08 (11th Cir. 1995) (noting, in the context of evaluating the merits of an equal protection claim, that "[w]hen section 1983 is used as a parallel remedy for [a] violation of . . . Title VII . . . , the elements of the two causes of action are the same.").

harassment they experienced, if any, "was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment." *Id.*

As we noted in *Miller,* this element contains both subjective and objective components; that is, "to be actionable, [the harassment] must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceive[s] to be abusive." *Miller,* 277 F.3d at 1276 (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71, 126 L. Ed. 2d 295 (1993)). Because defendants advance no argument concerning whether Kelley, Bryant, and Drake subjectively believed they were suffering abuse on account of their race, we focus on the objective component of the inquiry.

While it is true that the objective element is not subject to mathematical precision, we can infer that an environment is "hostile" or "abusive" from the circumstantial facts viewed in their proper context. *Harris,* 510 U.S. at 21-22, 114 S. Ct. at 370-71. This requires that we look to factors such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23, 114 S. Ct. at 371; *see also Allen v. Tyson Foods,* 121 F.3d 642, 647 (11th Cir. 1997).

The plaintiffs presented evidence that Jones, upon taking office, boldly implemented a plan to create a "darker administration" by refusing to hire whites for open managerial positions, demoting or transferring already employed white managers, and filling the positions they had been occupying with blacks. Jones, employing the assistance of Drew, Williams, and Stogner, targeted Kelley, Bryant, and Drake and endeavored to force them out of their positions by adversely altering their job responsibilities and otherwise undermining their authority. The record contains several examples of the tactics Jones and his subordinates used.

On several occasions, Jones angrily confronted Kelley. On one occasion, he approached her in a physically threatening manner. Following this incident, Kelley was forbidden to speak to the press or to communicate with the Board of Commissioners, even though this was part of her job as Director of the Parks Department. Jones stripped Kelley of her hiring authority, requiring her to interview candidates for vacancies with Williams. After she and Williams conducted interviews for the position of Deputy Director of Recreation Services, Williams ignored her suggestion that a white male should be chosen because Jones wanted an African American in the position, irrespective of qualifications. After complaining about the manner in which she was being treated, Stogner told Kelley that she failed to comprehend the overall political environment and could not understand or relate to "powerful black

men." Signaling Jones's intention to replace her with a black manager, Stogner told Kelley that Jones wanted "to showcase black parks and black employees." Eventually, Kelley was demoted (and subsequently replaced by Drew) and reassigned to the county's Greenspace program, where her responsibilities were further curtailed. She ultimately resigned.

Bryant showed that Drew, after Jones installed her as Director of the Parks Department, openly treated him differently from black employees. Drew's actions were assuredly in accordance with Jones's diktat to force out and replace white managers with African American managers. The record indicates that Drew (1) excluded Bryant from meetings and declined to allow him input into matters for which he was responsible, while seeking increased input from African American managers; (2) failed to provide him adequate support staff and equipment to perform his job; and (3) required white managers to make appointments to speak with her, while maintaining an open-door policy for African American managers. In addition, on several occasions, Drew drafted letters stating that Bryant was being terminated or suspended and left them in plain view so that Bryant and other employees could see them. Drew, however, never submitted the letters to Human Resources or delivered them to Bryant.

Jones precluded Drake from applying for the position of Director of the Parks Department because Jones had made "too many political commitments." Presumably, this meant that Jones had made too

many commitments to the black community to permit a white person to occupy the position. Stogner told Drake that his primary duty while in the Parks Department, was to "prop up" Drew. Also, Drew, in keeping with Jones's policy, removed Drake from his responsibilities as Assistant Director of the Parks Department and assigned him to perform the duties of a lower-level deputy director. Drew also (1) told department deputy directors to report to her, rather than Drake; (2) removed Drake as the Park Department's representative to the bond program, of which he had been a member since 1986; (3) prevented him from speaking to the media; and (4) excluded him from having any input into the Department's operations.

We find that these facts establish a pattern of harassing behavior "sufficiently severe or pervasive to alter the conditions of [the plaintiffs'] employment." *Suders*, 542 U.S. at 133, 124 S. Ct. at 2347.

3.

We likewise find, based on the facts as stated in part II.A.2, *supra*, that Kelley has established her constructive discharge claim against defendants Jones, Williams, and Stogner.[21] "Constructive discharge

[21] The district court granted Drew's motion for summary judgment with respect to Kelley's constructive discharge claim on grounds that there was an insufficient causal nexus between Drew's actions and Kelley's constructive discharge. *See Bryant*, 464 F. Supp. 2d at 1309.

occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 244 (4th Cir. 1997); *accord Young v. Southwestern Savings and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975) ("The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.").[22] A plaintiff must show "the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign." *Virgo v. Riviera Beach Assoc., Ltd.*, 30 F.3d 1350, 1363 (11th Cir. 1994); *see also Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996). Establishing a constructive discharge claim is a more onerous task than establishing a hostile work environment claim. *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or

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[22] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

pervasiveness of harassment than the minimum required to prove a hostile working environment."), *aff'd*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); *see also Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316-18 (11th Cir. 1989) (affirming district court's finding that plaintiffs established that they were subjected to a hostile work environment but were not constructively discharged); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905-06 (11th Cir. 1988) (same).

"An employer may defend against [a constructive discharge claim] by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of [discrimination], and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus." *Suders*, 542 U.S. at 134, 124 S. Ct. at 2347. A defendant cannot avail himself of this defense, however, "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." *Id.* Since Kelley has introduced convincing evidence of a humiliating demotion in this case, Defendants may not assert this defense.

Although we are careful not to gild the lily, Kelley has introduced shocking evidence of an overt and unabashed pattern of discrimination. Jones was abusive to Kelley on numerous occasions, including

an interaction where he appeared ready to assault Kelley physically. Additionally, from Williams's refusal to hire a white candidate, to Stogner's condescending and racially charged comments that Kelley couldn't relate to black men or that she was too ignorant or idealistic to understand racial politics in DeKalb County, it was clear that Kelley was not welcome to continue working for DeKalb County on account of her being white, and a reasonable person in her position would have had no choice but to resign. *See Virgo,* 30 F.3d at 1363. Kelley has, accordingly, established her claim.

4.

Although Kelley, Bryant, and Drake provided sufficient evidence to satisfy the "severe and pervasive" element of the hostile work environment claim, and Kelley has successfully made out a case of constructive discharge, Jones argues that the district court erred in concluding that he could be held accountable in his supervisory capacity for the alleged discrimination. In other words, he claims that the court erred in finding that his actions were a proximate cause of the hostile work environment alleged by Kelley, Bryant, and Drake, and of Kelley's constructive discharge. We disagree.

It is well established that liability in § 1983 cases cannot be premised solely upon a theory of *respondeat superior. Crawford v. Carroll,* 529 F.3d 961, 978 (11th Cir. 2008); *Braddy v. Florida Dep't of Labor & Employment Security,* 133 F.3d 797, 801 (11th Cir.

1998). In *Brown v. Crawford,* 906 F.2d 667 (11th Cir. 1990), we observed that supervisory liability

> occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.

Id. at 671. Additionally, a "supervisor" is not merely a person who possesses authority to oversee plaintiff's job performance but a person with the power directly to affect the terms and conditions of the plaintiff's employment. *See Andonissamy v. Hewlett-Packard Co.,* 547 F.3d 841, 848 (7th Cir. 2008).

The evidence before the district court established that Jones contrived a broad plan to eliminate white managers and replace them with black managers so as to create a "darker administration." As a means of implementing this scheme, Jones and his administration would "eliminate" the white managers' positions rather than simply firing the white managers. His discriminatory intent was further made plain by his open expressions of racial animus, calling Bryant

a "white bastard" and declaring that he wanted to terminate Kelley because he felt she let "whites" control the parks. Furthermore, his assertion that his actions were unconnected to Kelley's constructive discharge claim, considering that he issued the executive order that stripped her of her position as Director of the Parks Department, is especially farcical. In sum, this evidence showed compellingly that Jones, as the CEO, was the architect of a racially discriminatory scheme, a scheme that was designed to produce the overt discrimination the plaintiffs suffered. Unquestionably, he spawned the claims the plaintiffs have brought against him.

B.

Having found that Kelley, Bryant, and Drake presented evidence sufficient to sustain their several claims, we take the next step in the qualified immunity analysis and determine whether their rights to be free of the sort of discrimination they endured were clearly established at the time of the defendants' discriminatory acts. *See Wood,* 323 F.3d at 877-78. We have often noted the "patently obvious illegality of racial discrimination in public employment." *Smith v. Lomax,* 45 F.3d 402, 407 (11th Cir. 1995); *see also Yeldell v. Cooper Green Hosp., Inc.,* 956 F.2d 1056, 1064 (11th Cir. 1992) (finding it beyond question that laws proscribing intentional race discrimination in the work place were clearly established); *Brown v. City of Fort Lauderdale,* 923 F.2d 1474, 1478 (11th Cir. 1991) (same). The defendants argue, however,

that since specific plaintiffs failed to file complaints concerning the specific discriminatory acts that occurred, they were not afforded adequate notice that their behavior was unlawful. This argument is meritless.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the Supreme Court eliminated any subjective feature of its test for qualified immunity, finding that considerations of the official's state of mind while committing the allegedly unlawful acts have proven incompatible with its "admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-16, 102 S. Ct. at 2737. This is so because individualized questions concerning an official's state of mind are inherently fact-based and are thus inappropriate for resolution on summary judgment. *See id.* at 816, 102 S. Ct. at 2737. Accordingly, the question is not whether the defendants actually knew, or should have known, that their actions were unlawful, but, rather, whether reasonable officials occupying their positions would have known that their actions were unlawful. *Id.* at 818, 102 S. Ct. at 2738. Because a reasonable official would have known that discriminating against county managers on account of their race was unlawful, the district court ruled correctly in denying the defendants qualified immunity.

III.

We turn now to Lowe's claim that Stogner and Drew retaliated against him for refusing to participate in the achievement of Jones's discriminatory goal. Lowe contends that he was discriminated against on account of his race because, as an African American, he refused to go along with Jones's plan.[23] As a starting point, defendants argue that Lowe's claim fails because 42 U.S.C. § 1981(a) does not provide a private right of action for retaliation. The Supreme Court recently dispensed with this argument in *CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 128 S. Ct. 1951, 1961, 170 L. Ed. 2d 864 (2008), finding that "42 U.S.C. § 1981 encompasses claims of retaliation."[24] Recognizing that Lowe has a private right of action, we consider the merits of defendants' other affirmative defenses.

A.

Stogner and Drew first assert that the district court erred by concluding that Lowe's retaliation

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[23] Lowe also brought his retaliation claim against Jones, but the district court dismissed the claim as to Jones on legislative immunity grounds.

[24] Moreover, and as the Court observed in *CBOCS West, Inc. v. Humphries*, several courts of appeals, including this court in *Andrews v. Lakeshore Rehabilitation Hosp.*, 140 F.3d 1405, 1411-13 (11th Cir. 1998), had reached the same conclusion – that § 1981 encompasses claims of retaliation. *Humphries*, 128 S. Ct. at 1957.

claim was not precluded by the earlier administrative adjudication of his claim. They stress that Lowe was afforded an administrative hearing to allow him to challenge the elimination of his position, and, because the hearing officer issued a ruling adverse to him, Lowe is barred from relitigating the issue. Lowe's response is two-fold. First, he argues the preclusion issue cannot be raised here because the district court denied the defendants' motion to certify the issue for appellate review pursuant to 28 U.S.C. § 1292(b). Second, even if the issue is properly before this court, the district court was correct in holding that it was not bound by the administrative decision because the retaliation issue was not before the hearing officer.

After the district court rejected their qualified immunity defenses, Stogner and Drew moved the court, pursuant to 28 U.S.C. § 1292(b),[25] to enter an order certifying for appellate review the issue of whether Lowe's retaliation claim was barred by the administrative adjudication. The district court denied the motion. Although the district court declined to certify the issue, we may nevertheless exercise

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[25] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

pendent appellate jurisdiction and consider it so long as the issue is "inextricably intertwined with an appealable decision or when review of the former decision is necessary to ensure meaningful review of the latter." *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 177 F.3d 1212, 1221 (11th Cir. 1999) (internal quotation marks omitted). Exercising pendent jurisdiction over the preclusion issue is warranted in this case. The issue is "inextricably intertwined" with the qualified immunity issues because resolution of the preclusion issue in favor of the defendants will necessarily dispense of any need to pass on the immunity issues. Also, if we decline to decide the preclusion issue and later find that the defendants are not entitled to qualified immunity, Lowe's retaliation claim will proceed to trial. If a jury finds in favor of Lowe and, on appeal from final judgment, we hold that Lowe was procedurally barred from bringing his claim, our interlocutory review of the qualified immunity issue will be rendered nugatory, thereby frustrating the interests of judicial economy. *See Schmelz v. Monroe County,* 954 F.2d 1540, 1543 (11th Cir. 1992) (per curiam) (exercising pendent appellate jurisdiction over merits of case along with qualified immunity question so as to dispense with all federal issues).

Satisfied that the preclusion issue is properly before us, we proceed to the question of whether Lowe's claim is barred by the decision of the DeKalb County administrative adjudication. In *Travers v. Jones,* 323 F.3d 1294 (11th Cir. 2003), we encountered

this very issue. In *Travers*, the plaintiff appealed his thirty-day suspension from the fire department for insubordination and unbecoming conduct during a demonstration in which he engaged his superiors in a heated verbal exchange. A hearing officer upheld the suspension after finding that the facts surrounding the events "did not indicate any non-job-related factor or any errors of fact" warranting reversal of the suspension. *Id.* at 1296. The plaintiff then brought suit in federal court claiming he had been disciplined for engaging in protected union activity and that his First and Fourteenth Amendment rights were violated. On appeal, we found that the plaintiff was bound by the hearing officer's findings. We concluded that the findings were binding because "the employee received a full and fair opportunity to present his case in the administrative hearing." *Id.* We went on to explain that "[w]hen a state agency, acting in a judicial capacity, resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court." *Id.*

The facts of this case, however, distinguish it from *Travers*. The record shows that, under DeKalb County's administrative procedures, Lowe could only appeal the decision of the Board of Commissioners to eliminate his job by arguing that the Commissioners

could not establish a lack of funding or lack of work to justify their decision.[26] Lowe could not challenge the underlying discriminatory conduct he contends was the fountainhead of his termination because the hearing officer lacked the authority to consider that issue. Moreover, the hearing officer made very narrow and perfunctory factual findings tailored solely around his limited jurisdiction. His findings were as follows:

> The undersigned finds, in the instant case, that, in fact, the DeKalb County Board of Commissioners voted not to appropriate funding for the position of Deputy Director, Strategic Management, Park[s] and Recreation Department.

Plainly, the issue before the hearing officer was distinct from the issue presented to the district court, which was not whether Lowe's job was eliminated because of a true shortage of funding but whether Lowe's job was abolished in retaliation for his refusal to participate in a scheme to discriminate against white managers. Furthermore, aside from the administrative adjudication bar, traditional concepts of collateral estoppel, or issue preclusion, do not bind

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[26] Under Personnel Code of DeKalb County § 20-195, a hearing officer's authority is limited to deciding "whether the dismissal was in fact due to lack of work, lack of funds, lack of appropriation of funds, abolishment of the position or for other material changes in the duties of the position or the organization of the department."

this court. Collateral estoppel's operation requires that (1) an identical issue was presented in the prior proceeding; (2) the issue was a critical and necessary part of the prior proceeding; (3) the issue was fully and fairly litigated in the previous proceeding; (4) the parties in the two proceedings were identical; and (5) a final decision was rendered by a court of competent jurisdiction. *See Wingard v. Emerald Venture Fla. LLC,* 438 F.3d 1288, 1293 (11th Cir. 2006); *see generally Brown v. R.J. Reynolds Tobacco Co.,* 576 F. Supp. 2d 1328, 1340-41 (M.D. Fla. 2008). On their face, the hearing officer's findings relate solely to the issue of whether the Board of Commissioners voted to abolish Lowe's job. Therefore, Lowe's retaliation claim is not barred, as the administrative adjudication did not dispose of the allegations and arguments underpinning Lowe's retaliation claim.

B.

For his part, Stogner argues that the district court erred in failing to grant him absolute legislative immunity for developing the 2004 budget, which provided for the elimination of Lowe's position as Deputy Director of Strategic Management and Development of the Parks Department.[27] Lowe, in response, argues that Stogner was not engaging in

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[27] Denials of legislative immunity are subject to *de novo* review. *Yeldell v. Cooper Green Hosp., Inc.,* 956 F.2d 1056, 1060 (11th Cir. 1992).

legitimate legislative activities when crafting the 2004 budget with respect to Lowe's position. Instead, according to Lowe, Stogner used the proposed budget as an artifice for what was in fact a retaliatory personnel decision.[28] In resolving this matter, we bifurcate our analysis by first examining the broad principles underlying legislative immunity and then considering their application to the case before us.

1.

The Speech or Debate Clause of our Constitution provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. By its terms, the Clause is limited to members of Congress. *See Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 404, 99 S. Ct. 1171, 1179, 59 L. Ed. 2d 401 (1979). Nevertheless, state and local legislators, and their surrogates, enjoy a parallel immunity from civil liability for their legislative acts. *See Gravel v. United States,* 408 U.S.

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[28] We possess jurisdiction to review the district court's rejection of Stogner's claim of legislative immunity under the "collateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982) (authorizing immediate appellate review of a denial of legislative immunity); *see supra* note 2; *see also Harris v. Deveaux,* 780 F.2d 911, 913 (11th Cir. 1986) ("Absolute immunity is meant to protect not only from liability, but from going to trial at all.").

606, 618, 92 S. Ct. 2614, 2623, 33 L. Ed. 2d 583 (1972).[29]

Doctrinally, legislative immunity emanates from the well-spring of the federal common law; nevertheless, it is similar in scope and object to the immunity provided federal legislators under the Speech or Debate Clause. Indeed, when the Supreme Court initially recognized state legislative immunity as a constituent of the federal common law, it looked to its Speech or Debate Clause jurisprudence for guidance anent the contours of the doctrine. *See Tenney v. Brandhove,* 341 U.S. 367, 376-79, 71 S. Ct. 783, 788-90, 95 L. Ed. 1019 (1951). In later decisions, the Court acknowledged that the legislative immunity federal and state legislators enjoy are essentially coterminous. *See Supreme Court of Va. v. Consumers Union of the U.S., Inc.,* 446 U.S. 719, 732-33, 100 S. Ct. 1967, 1974-75, 64 L. Ed. 2d 641 (1980). By analogy, these principles afford legislators at the regional level similar protection to the extent they act

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[29] We have recognized that "efficient operation of contemporary government necessitates adjuncts performing responsibilities traditionally executed by the legislators." *Ellis v. Coffee County Bd. of Registrars,* 981 F.2d 1185, 1194 (11th Cir. 1993); *see also Gravel,* 408 U.S. at 616-17, 92 S. Ct. at 2623 ("[I]t is literally impossible, in view of the complexities of the modern legislative process, with . . . matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos. . . .").

in a capacity comparable to that of state legislators. *See Lake Country Estates, Inc.*, 440 U.S. at 404, 99 S. Ct. at 1179; *Ellis*, 981 F.2d at 1194. Furthermore, in this circuit, we have extended this immunity to local legislators, *Woods v. Gamel*, 132 F.3d 1417, 1419 (11th Cir. 1998) (citing *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. Unit A May 1981)), and their adjuncts, *see Ellis*, 981 F.2d at 1192. Hence, our consideration of Stogner's legislative immunity claim begins with a distillation of principles extracted from federal constitutional jurisprudence.

The Speech or Debate Clause finds its origin in a similar provision of the English Bill of Rights of 1689.[30] *See Tenney*, 341 U.S. at 372, 71 S. Ct. at 786; *United States v. Johnson*, 383 U.S. 169, 177-78, 86 S. Ct. 749, 753-54, 15 L. Ed. 2d 681 (1966). The Clause is designed to reinforce the independence of the legislative branch and ensure that it will be able to perform the whole of the legislative function ceded to it by the Constitution free of undue interference. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502, 95 S. Ct. 1813, 1820, 44 L. Ed. 2d 324 (1975). To

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[30] The English version provides: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, ch. II (1689) (quoted in *Tenney*, 341 U.S. at 373, 71 S. Ct. at 786). For thorough expositions on the historical antecedents of the Clause, *see* Justice Frankfurter's majority opinion in *Tenney*, 341 U.S. at 372-75, 71 S. Ct. at 786-87, and Justice Harlan's opinion for the Court in *Johnson*, 383 U.S. at 177-83, 86 S. Ct. at 753-57.

that end, the Clause protects officials "from inquiry into legislative acts or the motivation for actual performance of legislative acts," *United States v. Brewster,* 408 U.S. 501, 509, 92 S. Ct. 2531, 2536, 33 L. Ed. 2d 507 (1972), "from the burden of defending" certain suits, *Dombrowski v. Eastland,* 387 U.S. 82, 85, 87 S. Ct. 1425, 1427, 18 L. Ed. 2d 577 (1967) (per curiam), and "from the consequences of litigation's results," *id.*; *see generally Consumers Union,* 446 U.S. at 731-32, 100 S. Ct. at 1974, *Eastland,* 421 U.S. at 502-03, 95 S. Ct. at 1820-21; *Johnson,* 383 U.S. at 179, 86 S. Ct. at 755.

While the Court has given the Clause broad application, its protections are carefully tailored to its purposes. *See Eastland,* 421 U.S. at 501-02, 95 S. Ct. at 1820-21. Officials claiming protection "must show that such immunity is justified for the governmental function at issue." *Hafer v. Melo,* 502 U.S. 21, 28-29, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301 (1991). Accordingly, the privilege enures only to legislators engaging in actions considered "an integral part of the deliberative and communicative processes by which [legislators] participate in . . . proceedings with respect to the consideration and passage or rejection of proposed legislation." *Smith v. Lomax,* 45 F.3d 402, 405 (11th Cir. 1995) (quoting *Gravel,* 408 U.S. at 625, 92 S. Ct. at 2627) (alteration in original). The Clause does not confer absolute immunity "simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process

by insuring the independence of individual legislators." *Brewster,* 408 U.S. at 507, 92 S. Ct. at 2535.

2.

Turning to the matter here, Stogner initially asserts that the district court's analysis is flawed because it improperly focused on his position as Executive Assistant to the Chief Executive Officer (Jones).[31] We agree. In basing its denial of legislative immunity to Stogner on the fact that he "is not an officer or employee of a legislative body" but, rather, "an executive assistant of someone who is serving in an executive position," the district court erred by grounding its decision on Stogner's title rather than upon the function in which he was engaged that gave rise to Lowe's claim. Because the applicability of legislative immunity necessarily focuses on particular acts or functions, not on particular actors or functionaries, immunity also extends to legislative acts performed by executive officials and other non-legislators. *See Eastland,* 421 U.S. at 507, 95 S. Ct. at 1823 (declining to draw a distinction between the members of a congressional subcommittee and the subcommittee's counsel when the latter's actions were within the sphere of legitimate legislative activity); *Gravel,* 408 U.S. at 618, 92 S. Ct. at 2623 (holding

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[31] The district court found that Jones was entitled to legislative immunity because he introduced the 2004 budget proposal to the Board of Commissioners.

that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."). To be sure, when determining entitlement to the immunity, the position held by the official seeking immunity is not dispositive, as the "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v. White,* 484 U.S. 219, 227, 108 S. Ct. 538, 544, 98 L. Ed. 2d 555 (1988) (emphasis in original); *see Yeldell,* 956 F.2d at 1062 ("It is the nature of the act which determines whether legislative immunity shields the individual from suit.").

By preparing the 2004 budget proposal, which Jones approved and submitted to the Board of Commissioners, Stogner argues that he necessarily acted in a legislative capacity and is deserving of absolute immunity. As part of his argument, Stogner seeks to have us adopt a *per se* rule that would provide an executive official immunity any time he drafts a proposal that is later submitted to a legislative body. We decline to adopt such a rule as it cuts too broadly and is inapposite to the principle that our inquiry is not bound by officials' titles and the characterizations officials place on their own activities. Instead, we examine the facts of each case to determine "whether the [official] in the instant case [was] engaging in legislative activity." *Espanola Way Corp. v. Meyerson,* 690 F.2d 827, 829 (11th Cir. 1982), *cert.*

denied, 460 U.S. 1039, 103 S. Ct. 1431, 75 L. Ed. 2d 791 (1983).

We now evaluate whether Stogner was engaging in legitimate legislative activity when he developed and drafted the 2004 budget, which eliminated Lowe's position. In doing so, we are careful to limit our decision to this narrow issue and decide "only what is necessary to the disposition of the immediate case." *Whitehouse v. Ill. Cent. R.R. Co.,* 349 U.S. 366, 373, 75 S. Ct. 845, 850, 99 L. Ed. 1155 (1955). Generally, absolute immunity applies to "prospective, legislative-type rules" that have general application. *See Alexander v. Holden,* 66 F.3d 62, 67 (4th Cir. 1995). "Employment decisions generally are administrative except when they are accomplished through traditional legislative functions such as policymaking and budgetary restructuring that strike at the heart of the legislative process." *Acevedo-Garcia v. Vera-Monroig,* 204 F.3d 1, 8 (1st Cir. 2000) (internal quotations omitted).

Relying on *Bogan v. Scott-Harris,* 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998), Stogner characterizes his behavior as a legitimate legislative act by virtue of his developing and drafting the budget proposal that was later adopted by the Board of Commissioners. Implicit within this characterization is the assertion that the elimination of Lowe's position (Deputy Director of Strategic Management and Development Parks and Recreation Department) arose out of broad policy and budget considerations and did not stem from specific facts as they related to

Lowe. We agree. In *Bogan,* the plaintiff alleged that her discharge, which was accomplished through an ordinance eliminating a city department (of which she was the sole employee), was motivated by racial animus and was in retaliation for filing a complaint against another employee who had used racial and ethnic slurs. 523 U.S. at 46-47, 118 S. Ct. at 969. The Supreme Court found that absolute immunity should apply because the ordinance "bore all the hallmarks of traditional legislation." *Id.* at 55, 118 S. Ct. at 973. According to the Court, the ordinance "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city," and it had prospective impact because it eliminated a department rather than a single employee. *Id.* at 55-56, 118 S. Ct. at 973. Put differently, the alleged retaliation had a substantial nexus to the legislative process.

Lowe, however, attempts to cast this case as merely an employment action masked by the legislative process. He argues that legislative immunity is unavailable where, as here, the legislation adversely impacted a single individual. The argument is unavailing. Ordinarily, the decision to terminate an individual's employment is characterized as an administrative action, *see In re Montgomery County,* 215 F.3d 367, 376 (3d Cir. 2000) (finding the decision to eliminate a particular employee rather than employee's position constitutes an administrative, rather than legislative act); *Acevedo-Garcia,* 204 F.3d at 8 (holding that selective layoffs of particular employees do not constitute legislative acts); *Canary v. Osborn,*

211 F.3d 324, 330-31 (6th Cir. 2000) (same), but Lowe's employment was not terminated in this case. The Board of Commissioners chose to adopt the 2004 budget, which abolished the position of Deputy Director of Strategic Management and Development, Parks and Recreation Department. This distinction proves dispositive.

Unlike employee personnel decisions, the elimination of a public employment position does constitute a legislative act. In *Bogan,* the Supreme Court noted that the elimination of a public employment position – as compared to the firing of a single individual – is a quintessential legislative act. *See Bogan,* 523 U.S. at 55-56, 118 S. Ct. at 973. Unlike the termination of an individual employee, the elimination of a public employment position "may have prospective implications that reach well beyond the particular occupant of the office." *Id.* at 56, 118 S. Ct. at 973. Here, the decision to abolish the position – and Stogner's involvement in preparing the budget proposal – is properly construed as embodying a policy decision with prospective implications.

Lowe further argues that legislative immunity does not attach to Stogner because Stogner developed the 2004 budget as a continuation of Jones's racially discriminatory policy to eliminate managers through reorganizations rather than firings. Lowe notes that prior to his developing and drafting the 2004 budget proposal, Drew had hired Billups into the exact position Lowe held. And for approximately five months, Billups performed the same job functions. Then, by

sleight of hand, Billups was given another job title while still performing the same functions as Lowe, thereby rendering Lowe's position and title unnecessary. Lowe also points out that, of 600 positions in the Parks Department, his position was the only one eliminated. This, according to Lowe, demonstrated that Stogner's actions were not directed at legitimate legislative goals but, rather, were aimed at punishing him for refusing to participate in Jones's scheme to eliminate white managers.

While these facts obviously suggest an improper motive, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney,* 341 U.S. at 377, 71 S. Ct. at 788. Surely, the privilege "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* Moreover, it simply is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Id.* Therefore, we need not examine Stogner's motives in drafting the 2004 budget, as the inquiry is simply "whether, stripped of all considerations of intent and motive, [Stogner's] actions were legislative." *Bogan,* 523 U.S. at 55, 118 S. Ct. at 973.

In fine, we find that Stogner is entitled to absolute legislative immunity against any claims, including Lowe's retaliation claim, arising from actions directly related to his preparing and drafting the 2004 budget proposal.

C.

Having found that Stogner possesses legislative immunity with respect to Lowe's retaliation claim, we next consider whether Drew is entitled to qualified immunity regarding that claim. We begin by noting that, since Lowe failed to raise in the district court the issue of whether Drew was performing a discretionary function when committing the discriminatory acts, the issue is not before us. *See Johnson,* 340 F.3d at 1228 n.8. Turning to the qualified immunity question, we first look to whether Lowe has established a violation of his statutory or constitutional rights. Absent direct evidence of discrimination, when analyzing claims for race-based retaliation brought under § 1981, we employ the tripartite analytical framework developed by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and subsequently modified in *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). *See Patterson v. McLean Credit Union,* 491 U.S. 164, 186, 109 S. Ct. 2363, 2377-78, 105 L. Ed. 2d 132 (1989) *superceded in part by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981); *Standard v. A.B.E.L. Servs., Inc.,* 161 F.3d 1318, 1330 (11th Cir. 1998) (stating that Title VII and § 1981 "have the same requirements of proof and use the same [*McDonnell Douglas/Burdine*] analytical framework"). Under this framework, a plaintiff alleging retaliation must first establish a prima facie case

by showing that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) he established a causal link between the protected activity and the adverse action. *Raney v. Vinson Guard Serv. Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993). These three elements create a presumption that the adverse action was the product of an intent to retaliate. Once a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant to rebut the presumption by articulating a legitimate, non-discriminatory reason for the adverse employment action. *See Goldsmith*, 996 F.2d at 1163. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," *Burdine*, 450 U.S. at 255, 101 S. Ct. at 1094-95, and "drops from the case," *id.* at 255 n.10, 101 S. Ct. at 1095 n.10. After the defendant makes this showing, the plaintiff has a full and fair opportunity to demonstrate that the defendant's proffered reason was merely a pretext to mask discriminatory actions. *See Raney*, 120 F.3d at 1196.

Initially, Drew argues that the district court erred by finding she waived any argument on summary judgment that Lowe failed to establish a prima facie case of retaliation because she failed to develop the argument in her motion for summary judgment until filing her reply brief. Drew asserts that, by stating the elements of the required prima facie showing in her initial summary judgment pleading,

she preserved the argument. We disagree. It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal. *See, e.g., Millennium Partners, L.P. v. Colmar Storage, LLC,* 494 F.3d 1293, 1304 (11th Cir. 2007); *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1256 n.6 (11th Cir. 2005). An insignificant recitation of black letter law is not tantamount to raising an issue for adjudication. *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (finding that a party waives an issue by failing to make any substantive arguments with respect to that issue). Thus, Drew is procedurally barred from raising the issue on appeal and has conceded any argument that Lowe failed to establish a prima facie case of retaliation.

Drew also argues that Lowe failed to present evidence capable of establishing that her non-discriminatory explanation for recommending the abolishment of Lowe's position was pretextual. Before the district court, Drew explained that she recommended that Lowe's position be eliminated because it was no longer needed and other employees were performing duties originally assigned to it. To establish that Drew's explanation was merely a pretext for discrimination, Lowe had to "present concrete evidence in the form of specific facts which show[ed] that the defendant's proffered reason [was] mere pretext. Mere conclusory allegations and assertions

w[ould] not suffice." *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

As the district court noted, the "complicated assignment process" suggested that Drew's explanation was pretextual. After Lowe refused to be a "team player," Drew moved his office to the same floor as Jones's office, presumably so that Jones could monitor Lowe's activities. Jones again told Lowe that if he wanted to work for DeKalb County, he would have to become a "team player." Because Lowe continued to refuse to participate in Jones's plan, Drew hired Billups into the same position as Lowe's and gave him duties once assigned to Lowe. Although Lowe and Billups continued to perform the same duties, Drew changed Billups's job title to Deputy Director of Recreation Services. Drew then recommended to Stogner that Lowe's position be abolished, and the 2004 budget provided for its abolition. These facts suggest that Drew participated in a scheme to make Lowe's position redundant and effectively terminate him because he refused to participate in Jones's plan to eliminate white managers.

Drew next argues that her alleged acts of retaliation did not violate clearly established law because the availability of a claim for retaliation brought under 42 U.S.C. § 1981 was not well-established. Drew contends that the district court's error lies in its finding that the right to be free from discriminatory retaliation was clearly established under Title VII and its failing to consider whether the right also was clearly established under § 1981. Therefore, according

to Drew, because Lowe's claim is grounded in § 1981, any reliance the district court placed on Title VII cases for the proposition that a discriminatory retaliation cause of action was clearly established under § 1981 was error. This argument strains credulity.

The Supreme Court has explained that a constitutional right is "clearly established" when the "contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Under this standard, a plaintiff need not show that the government official's conduct specifically has been held unlawful, but rather that "in the light of pre-existing law the unlawfulness [was] apparent." *Id.* Amplifying this principle, the Court noted that "'general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227, 137 L. Ed. 2d 432 (1997)) (internal citation omitted; alteration in original). This precedent makes clear that a right may be clearly established irrespective of whether courts have specifically deemed the cause of

action as being available under a particular legal theory. Accordingly, the question is not whether a reasonable officer would know that a discriminatory retaliation claim was available under Title VII or § 1981; rather, the salient question is whether the state of the law at the time provided officials fair warning that their discriminatory retaliatory conduct was unlawful. *See Hope,* 536 U.S. at 741, 122 S. Ct. at 2516.

Furthermore, even if Drew's misguided interpretation of the "clearly established" prong of the qualified immunity test was correct, it is well-established in this circuit that claims for retaliation are cognizable pursuant to § 1981. *See Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1212-13 (11th Cir. 2008); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008); *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1279 (11th Cir. 2005); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411-13 (11th Cir. 1998); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997).[22]

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[22] We further reject Drew's contention that, since the Supreme Court had not addressed the issue before the alleged discrimination occurred, we cannot find that the right had been clearly established at that time. We have said that, in the absence of Supreme Court authority, we may look to the decisions of this court when deciding whether the contours of a right have been clearly established. *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc) (finding that, when courts in this Circuit must look to case law in order to discern whether a right has been clearly established, we look to decisions of the U.S. Supreme Court, the Court of Appeals for

(Continued on following page)

Consequently, Drew may not find shelter under the doctrine of qualified immunity.[33]

IV.

For the reasons stated above, the judgment of the district court is REVERSED, to the extent it denied Stogner legislative immunity. The judgment of the district court is AFFIRMED in all other respects. The case is REMANDED for further proceedings not inconsistent with this opinion.

SO ORDERED.

Appendix

DeKalb County Government Hierarchy

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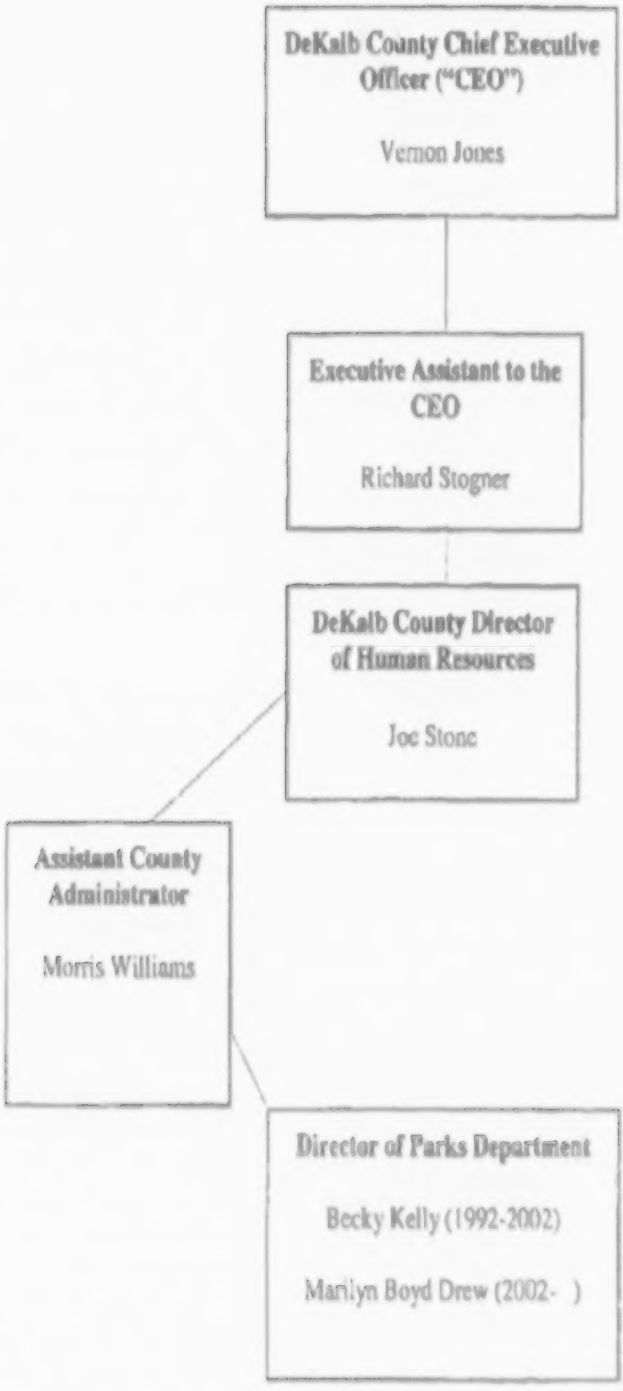
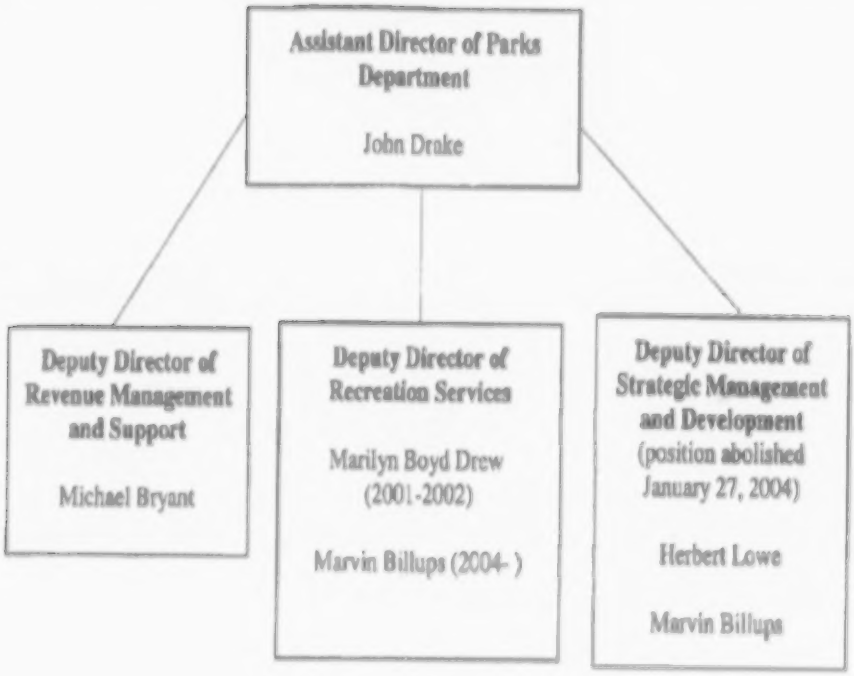
the Eleventh Circuit, and the highest court of the pertinent state). As the cases in the text reveal, the right to be free from racially motivated retaliation under § 1981 had been clearly established in this circuit when Lowe's discriminatory retaliation claim arose.

[33] Drew also argues that she cannot be held individually liable because she did not make the ultimate decision to eliminate Lowe's position. This argument misses the point. Lowe is not bringing a Title VII claim for discriminatory discharge in which he is attempting to impute Drew's racial animus to her employer, DeKalb County, *see Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331-32 (11th Cir. 1999) (per curiam); rather, he is bringing a § 1981 claim for retaliation, arguing that Drew actively participated in a scheme to retaliate against him due to his refusal to be a "team player" and assist in discriminating against white managers.


DeKalb County Chief Executive Officer ("CEO")
Vernon Jones
Executive Assistant to the CEO
Richard Stogner
DeKalb County Director of Human Resources
Joe Stone
Assistant County Administrator
Morris Williams
Director of Parks Department
Becky Kelly (1992-2002)
Marilyn Boyd Drew (2002-)


Assistant Director of Parks Department
John Drake
Deputy Director of Revenue Management and Support
Michael Bryant
Deputy Director of Recreation Services
Marilyn Boyd Drew (2001-2002)
Marvin Billups (2004-)
Deputy Director of Strategic Management and Development (position abolished January 27, 2004)
Herbert Lowe
Marvin Billups

Michael BRYANT, John Drake, Becky Kelley and Herbert Lowe, Plaintiffs,

v.

Vernon JONES, Marilyn Boyd Drew, Morris Williams, Richard Stogner and Joe Stone in their individual and official capacities, Defendants.

No. 1:04 CV 2462 WSD.

United States District Court,
N.D. Georgia,
Atlanta Division.

Nov. 21, 2006.

James L. Hollis, John Thomas Morgan, III, Joshua Barrett Belinfante, Michael J. Bowers, Christopher Scott Anulewicz, Balch & Bingham, Atlanta, GA, for Plaintiffs.

Brent L. Wilson, Nancy Fullerton Reynolds, Elarbee Thompson Sapp & Wilson, Scott R. Sausser, Elizabeth Penn Payne, Penn Payne LLC, Robert B. Remar, Kerri Anne Gildow, Rogers & Hardin, Atlanta, GA, for Defendants.

OPINION AND ORDER

DUFFEY, District Judge.

This matter is before the Court on Defendant Richard Stogner's Renewed Motion for Summary Judgment ("Stogner MSJ") [256], Defendant Joe Stone's Renewed Motion for Summary Judgment

("Stone MSJ") [257], Defendant Vernon Jones's Renewed Motion for Summary Judgment ("Jones MSJ") [259], Defendant Marilyn Boyd Drew's Renewed Motion for Summary Judgment ("Drew MSJ") [262], and Defendant Morris Williams's Renewed Motion for Summary Judgment ("Williams MSJ") [263].[1]

I. INTRODUCTION

This case concerns alleged discriminatory employment practices in DeKalb County. The claims are brought by three white managers and one black manager. The white managers, Becky Kelley, Michael Bryant and John Drake, claim they were discriminated against and suffered a hostile work environment based on their race. The black manager, Herbert Lowe, claims he suffered illegal retaliation because he refused to participate in discrimination against white county managers. The allegations center around employment practices that allegedly commenced with the change in DeKalb County leadership in 2001.

Defendant Vernon Jones, a black male, was elected DeKalb County's Chief Executive Officer

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[1] Defendants also filed a Joint Motion to Supplement Exhibit [282], asking the Court to permit them to supplement Exhibit 27 of Volume II of the Declarations, Deposition Excerpts and Exhibits in Support of Defendants' Renewed Motions for Summary Judgment by including an inadvertently omitted page. There is no opposition to this motion, and it is **GRANTED**.

("CEO") in November 2000 and assumed office on January 1, 2001. Typical of administration changes in government, a number of organizational and reporting structure changes occurred when Jones become the CEO. Plaintiffs allege these structural changes were implemented, in part, to enact a plan to replace white county managers with black county managers in order to increase the overall number of minorities in county government managerial positions, and that this was done to benefit Defendant Jones politically. Plaintiffs allege this plan directly impacted the Parks and Recreation Department ("Parks Department" or "the department") and them personally. They claim Defendants' discriminatory policies caused them to suffer adverse employment actions, created a hostile work environment with the goal of coercing them to terminate their employment, and generally constituted actionable racial discrimination.

II. FACTUAL BACKGROUND

A. The Parties

On January 1, 2001, Kelley, Bryant and Drake were managerial employees of the Parks Department. Plaintiff Becky Kelley, a white female, had been employed by DeKalb County since 1976. Sixteen years after becoming a county employee, in 1992 she was appointed as the Director of the Parks Department with authority over the department's operation and programs. Kelley was serving in this position when Jones assumed his duties as CEO in

January 2001. Plaintiff Michael Bryant, a white male, was hired by DeKalb County in 2000 as the Deputy Director of Revenue Management and Support in the Parks Department, and he reported to Kelley. He was serving as Deputy Director on January 1, 2001, when Jones became CEO. Plaintiff John Drake, a white male, was hired by DeKalb in 1975 and became the Assistant Director of the Purchasing and Contracting Department in 1997. He was serving in this position on January 1, 2001. Plaintiff Lowe, a black male, started employment with DeKalb County on September 16, 2002. He was hired as the Deputy Director of Strategic Management and Development for the Parks Department.

Plaintiffs allege that Defendants, all of whom were senior managers either in DeKalb County generally or the Parks Department specifically, played central roles in a plan to discriminate against white Parks Department managers. There are five Defendants alleged to be involved in the plan to discriminate against Plaintiffs. Defendant Vernon Jones, a black male, is the elected DeKalb County CEO. Defendant Richard Stogner, a white male, was hired by Jones as his executive assistant. Stogner assumed his position when Jones took office. Defendant Joe Stone, a black male, is the DeKalb County Director of Human Resources with overall supervisory authority over human resources, hiring, assignment and other personnel functions within the county. Defendant Morris Williams, a black male, is the Assistant County Administrator with supervisory

responsibility for a variety of county departments, including the Parks Department. Defendant Marilyn Boyd Drew, a black female, was first hired in April 2001, initially as the Parks Department's Director of Recreation Services, but was promoted ten months later to the position of Acting Director of the Parks Department, replacing Plaintiff Kelley. Drew became the permanent Director of the department a month later.

Plaintiffs Bryant Drake and Kelley allege that once Defendants took their management positions under Jones, they began a systematic effort to adversely affect Plaintiffs' work duties and environment, which was calculated to force the white Plaintiffs to terminate their county employment so that black managers could be hired to replace them. Plaintiff Lowe alleges he opposed the plan to discriminate against white managers, and Defendants responded by engaging in administrative maneuvers which resulted in the abolishment of his position. Defendants, he alleges, engaged in unlawful retaliation against him for his opposition to illegal discrimination. The alleged impact on each Plaintiff is discussed separately.

B. Discrimination Alleged

Plaintiff Kelley

Kelley had served as the Director of the Department of Parks and Recreation for nine years when Jones became the CEO. There is no evidence in

the record suggesting that Kelley did not perform her job duties well and to the satisfaction of her superiors. Almost immediately after Jones assumed office, Kelley claims he began to confront her. On one occasion, Jones became very angry with Kelley on a phone call. A second confrontation occurred when, in a private meeting in Jones's office, Jones yelled and screamed at Kelley and approached her in such a way that Kelley believed Jones was going to hit her. At this meeting, Jones imposed restrictions on Kelley's duties as Director of the Parks Department, including prohibiting her from communicating with the press and from speaking to members of the DeKalb County Board of Commissioners ("the Board"), responsibilities Kelley had been performing in her capacity as Director. Kelley stated that on two occasions Defendant Stogner told her that "she didn't understand the geopolitical issues of DeKalb County and that she could not relate to powerful black men."

Kelley's Director responsibilities were, as she viewed it, further limited after January 2001. Before January 2001, she was, as department Director, responsible for reviewing applicants seeking employment in her department. After January 2001, she was prohibited from interviewing candidates unless Defendant Williams was present. Consistent with this changed policy, in early 2001, Kelley and Williams interviewed candidates for the Deputy Director of Recreation in the Parks Department. Kelley considered a white male to be one of the top candidates for the position, but Williams told Kelley

they could not recommend a white candidate to Jones because he would not accept a white candidate. The white candidate was not recommended. Kelley was told by Stogner to offer the position to Defendant Drew, a black candidate. Stogner suggested to Kelley that by offering Drew the position, Kelley could "get in good" with Williams. Drew was offered the position, and she was hired on April 30, 2001.

Once Drew was hired, Jones and Williams began to exclude Kelley from discussions and decisions regarding the Parks Department and its operation. Specifically, she was not informed of or consulted about hiring in her department. Stogner commented to Kelley that Jones wanted "to showcase black parks and showcase black employees," which she understood as Stogner's explanation regarding why she was being excluded from department planning discussions and decisions.

On February 12, 2002, Jones issued an executive order implementing significant structural changes in the Parks Department. The order had a significant impact on Kelley and her duties. She was removed as Director of the department and reassigned to a group to coordinate the county Greenspace program. The transfer did not affect her salary and benefits. Defendant Drew, hired just a few months earlier, was appointed Acting Director to replace Kelley. Kelley's Greenspace assignment was a significant change in her duties and authority. She was not given a title, and her reporting chain was changed. Rather than reporting to the CEO's office, as she had done as the

Director of the Parks Department, as a member of the Greenspace group she reported to an Assistant County Administrator. Drew also attempted to place Kelley in a small windowless office that had been used as a storage area.[2] As the Greenspace coordinator, Kelley's input was ignored and her recommendations rebuffed to such an extent that she did not consider herself to have any authority or job responsibilities. She described her job as one that ultimately was reduced to "coloring maps." About seven months later, on September 25, 2002, she submitted her resignation effective on October 9, 2002.

Plaintiff Bryant

When Drew was installed as Director of the Parks and Recreation Department, she implemented changes in department assignments. Specifically, in June 2002, shortly after she was appointed Director, Drew changed Bryant's job responsibilities by assigning him the duties ordinarily performed by the Director of Recreation. Although Bryant's job was limited to the recreation area, he maintained his title of Deputy Director of Revenue Management and Support. His salary and benefits remained the same. In March 2002, Bryant complained about what he

[2] Kelley objected to this office assignment, considering it demeaning, and ultimately was not moved to the office suggested by Drew.

believed was an excessive salary a black contractor was paying to his wife. The contractor's company had been hired by the Parks Department to perform services at a county golf course. Drew removed from Bryant responsibility for golf and tennis contracts and reassigned the fiscal and contracting duties for those contracts to Drake. Day-to-day operational responsibility for the golf and tennis contracts was assigned to Detrick Stanford, a black employee who reported directly to Drew.

On or about August 5, 2002, about 60 days after his duties changed, Bryant was moved out of the department's offices in Decatur and reassigned to an office in Tucker, Georgia. Bryant claims his supervisory duties and support also were adversely impacted by Drew. He claims his requests for staffing, information, computers and other requests made to assist in the performance of his duties were not honored.[3] Bryant claims employees he supervised were assigned duties without his input or knowledge, and he was excluded from meetings and discussions regarding the areas for which he was responsible. While Drew solicited and received input from black employees, white employees, Bryant claims, were

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[3] Bryant claims Drew's treatment of him even impacted his personal life. For example, when he requested comp time in connection with his surgery, Drew denied his request. When Bryant was ready to return to work after his surgery, Drew refused to allow him to do so, delaying his return for a week beyond the date he requested.

isolated from decision making. Bryant was not given a performance report before this lawsuit was filed, and the absence of a report affected his receipt of a merit salary increase.[4] Bryant claims that Drew threatened to terminate him and actually drafted letters suspending him, which she carried around the office in such a way that they were visible to Bryant in order to let him know she had drafted the letters. Bryant was not suspended or terminated. Bryant's title remains Deputy Director of Revenue Management and Support Services although he performs only those limited duties assigned to him by Drew.[5] In October 2003, Marvin Billups, a black male, was given the position of Director of Recreation Services, although Bryant actually performs the tasks that are

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[4] Other employees, including black employees, apparently also were not timely evaluated.

[5] On July 15, 2003, Bryant filed a hostile work environment complaint against Drew with the DeKalb County Human Resources Department. After the complaint was filed, Bryant sent emails to the DeKalb County EEO Manager, Curtis LeBlanc, to ask about the status of the investigation. Bryant claims LeBlanc did not respond. LeBlanc interviewed all listed witnesses on the report with the exception of Plaintiff Lowe, who refused to be interviewed, apparently for fear of retribution from Defendants. Nine months after Bryant filed the complaint, LeBlanc submitted his findings to Defendant Stone, Director of Human Resources. The report indicated underlying problems in Drew and Bryant's relationship without finding conclusive evidence of discrimination. Stone and Stogner both reviewed the report and concluded no discrimination occurred and that no further action was necessary. The human resources department did not contact Bryant or inform him of the results of his complaint.

included in the Director of Recreation Services job description.

Plaintiff Drake

Plaintiff Drake has been employed with DeKalb County for 31 years and has served as the Assistant Director of the Purchasing and Contracting Department since 1997. On February 12, 2002, Jones transferred Drake to the Parks and Recreation Department as its Acting Assistant Director. Drake negotiated a salary increase in connection with his transfer, and his other benefits remained the same. Drake was interested in being appointed permanent Director of the Parks Department after Kelley was transferred to the Greenspace program in February 2002. Stogner, however, told him that while he was qualified for the Director position when it was open in 1992, Jones had made "too many political commitments" to consider Drake for Parks Department Director. Drake was told that he was transferred to the Parks Department to "prop up" Drew, who was made the new Director.

Drake could not compete for the position of permanent Director of the Parks Department because of the manner in which the position was advertised and who was allowed to apply. The permanent Parks Department Director position was advertised only as an intra-departmental promotion, meaning that only those who were Parks Department employees could apply. Applications were required to be submitted between February 25, 2002 and March 8, 2002.

Drake's transfer to the Parks Department as its acting Assistant Director was designated by Jones to be effective on March 16, 2002, eight days after the application period closed.

According to Drake, after Drew was appointed Acting Director of the Parks Department, she aggressively reduced his job responsibilities, removing from him those responsibilities typically delegated to the Assistant Director and effectively reducing his duties to those of a lower level Deputy Director. When Drew became Director, she also required all Parks Department Deputy Directors to report directly to her instead of to him in his capacity as Assistant Director of the Department. Drew also removed Drake as the Parks Department's representative to the county bond program group, of which he had been a member since 1986. Although he was Drew's Assistant Director, Drew did not consult with him regarding the reorganization of the department, and she neglected to consult with him when his subordinates were hired. Drew excluded Drake from discussions regarding DeKalb County's golf course management and revenue results and operations, even though the golf courses were included in Drake's area of responsibility.[6]

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[6] Employees were required to submit to their supervisors performance plans for the areas for which they were responsible which set out objectives for the coming year. Before a review of the previous year could be submitted to human resources, the employee and supervisor were required to complete the

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Plaintiffs Kelley, Bryant and Drake offer this conduct as evidence that Defendants treated them differently than black employees, and that this different treatment was discriminatory. While Defendants' conduct often appears to be neutral and characteristic of action taken by the new management of a political subdivision, Plaintiff Lowe offers evidence that he was advised of Jones' intention to eliminate white managers to allow the hiring of additional black managers.

Plaintiff Lowe

On September 16, 2002, after Drew became the permanent Director of the Parks Department, Lowe, a black male, began work as the department's Deputy Director of Strategic Management and Development. After he was hired, he was told of a plan to increase the number of black managers in the Parks Department, including the position to which he was hired. Lowe claims that Stone told him that if white individuals had expressed an interest in the Deputy Director position to which Lowe was hired, they would not have been considered. Lowe stated that he

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performance plan. Drake submitted a performance plan to Drew, but Drew never met with Drake regarding his performance plan, nor did she give him a performance review. Drew claims that she does not know what happened to Drake's performance plan after he submitted it, although she admitted that she found it in her credenza when she conducted her search for documents responsive to discovery.

was told by Jones, Stone, and Drew that it was Jones' agenda to eliminate white managers from the Parks Department so that the number of black department managers would be increased. Lowe claims specifically that when Drew welcomed him to DeKalb County, she told him that white managers were being eliminated from the Parks Department because the CEO's agenda was to get reelected, and Stone was making sure the CEO's agenda was executed.

Jones told Lowe that the white employees in the Parks Department needed to be removed, and the whole department needed to be reorganized. Lowe claims Jones told him on several occasions that he wanted a "darker administration." He also told Lowe that he wanted Kelley, Bryant, and Drake out of the Parks Department and that Jones referred to Drake as a "white bastard." Drew told Lowe to "dig up dirt" on white employees in the Parks Department and to make sure white employees were not publicly visible nor in positions where they would have the opportunity publically to accept awards that were received by the Department. Drew told Lowe to withhold information from white employees, including Plaintiffs Kelley, Bryant and Drake, so they would be kept in the dark and made to appear incompetent at their jobs. Drew told Lowe she transferred Bryant into a recreation function knowing he was not experienced in the recreation area, and he thus would be perceived as incompetent in his duties. She told Lowe not to discuss important issues with Bryant because she wanted to keep Bryant in the dark so

that he would fail. Drew instructed Lowe not to speak with Plaintiffs Kelley, Bryant, or Drake and the "old white women" in the recreation division. Lowe claims that Jones, Stone, Drew and Williams each told him that there was a plan to remove white managers in DeKalb County, that the plan was referred to as a "reorganization," and that there were ways to get rid of employees without firing them.

Lowe told Defendants that he would not participate in their plan to eliminate white employees, and he did not carry out orders given to him that were designed to discriminate against them. Jones told Lowe he was not being a "team player," and stated further that Lowe did not appreciate or understand what Jones was trying to accomplish with his agenda. Eventually, Lowe told Jones he wanted out of the Parks Department, and if he was not moved he would resign.

Thereafter, around May 2003, Lowe's office was moved into Jones' executive suite on the sixth floor of DeKalb County's offices. Although Lowe continued to work for the Parks Department, Lowe also assisted Jones with special projects.

On July 23, 2003, Drew hired Marvin Billups, a black male, as the Deputy Director of Strategic Management and Development, the same title and position held by Lowe. Billups's employment in this position was characterized as time-limited, meaning the appointment was only up through and including December 31, 2003. Although this position already

existed and was being filled by Lowe, because the duplicate position was "time-limited," it was not required to be publically advertised as an open position, and it was not required to be processed through DeKalb County's competitive hiring process. Before Billups' duplicate Deputy Director position expired, Billups was named Deputy Director of Recreation. Although his title changed, Billups continued to perform the same tasks as he did in his Deputy Director of Strategic Management and Planning position.

On December 3, 2003, Jones submitted his budget[7] for the County to the Board of Commissioners. The budget eliminated funding for Lowe's Deputy Director position, and therefore the budget effectively proposed its elimination. On January 27, 2004, the Board of Commissioners adopted the budget and Lowe's position was dissolved. Of the 600 positions in the budget, Lowe's position was the only one that was abolished. Because Billups had recently been transferred out of the eliminated position into another one which was funded, he maintained his employment with the county and continued to perform the tasks he performed in the eliminated position. Thus, as a practical matter, Lowe was terminated, Billups was not, and Billups continued to perform the Strategic Management and Planning

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[7] The budget was drafted by Stogner, but ultimately approved and submitted by Jones to the Board for review and approval.

functions of Lowe's position, but under his new Deputy Director of Recreation job title. On February 3, 2004, Stogner offered Lowe the position of Parks Maintenance Coordinator. This position was at a lower salary and stature. Lowe refused to accept it and resigned.[8]

The account set out in this section sets forth Plaintiffs' version of the facts in this case. Defendants do not contest the changes in the Plaintiffs' job titles and positions, nor do they contest that certain changes were made in Plaintiffs' job titles and positions. Defendants, however, deny they made each of the statements the Plaintiffs claimed that Defendants made, particularly those that Plaintiffs offer as evidence of Defendants' intention to reduce the number of white managers in the county and in the Parks Department specifically. Defendants deny treating Plaintiffs differently from the way black managers were treated. Defendants deny wrongfully limiting Plaintiffs support or input, and they deny that they requested Plaintiff Lowe or any other

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[8] The racial composition of managers in DeKalb County shows a material increase in the number of black managers in the county after Jones became CEO. In January 2001, there were 98 managerial employees at pay grade 33 which the CEO had authority to hire. In January 2001, of those 98 managers, 61 were Caucasian and 33 were African-American. Four years later, in August 2005, there were 122 managers at pay grade 33. Of those 122 managers, 58 were Caucasian and 60 were African-American. Thus, the number of black county managers almost doubled from 2001 to 2005, while the total number of white managers decreased slightly during the same time period.

person to participate in an effort to discriminate against white managers. They deny that their actions were taken with racial animus or hostility toward white managerial employees. They deny that any of the Plaintiffs were given inferior or less prestigious jobs when they were transferred, and they deny engaging in any effort to cause Plaintiffs to terminate their employment with the county.

III. PROCEDURAL BACKGROUND

On August 24, 2004, Plaintiffs filed their Complaint against Defendants. (Compl. [1].) Plaintiffs' claims include: violation of equal protection under 42 U.S.C. § 1983 (Count I); intentional race discrimination in violation of § 1983 through 42 U.S.C. § 1981 (Count II); conspiracy to deprive civil rights (Count III), retaliation (Count IV); violation of first amendment rights (Count V), and attorney's fees (Count VI.). (*Id.* at ¶¶ 89-123.) On October 1, 2004, Defendants filed their Answers to the Complaint. (Answers [10] [11] [12] [13].) On June 1, 2005, Defendants filed their first motions for summary judgment. After the motions were filed, the Court concluded that limited, additional discovery was warranted from March 22, 2006 through May 31, 2006. [Order Denying Motions for Summary Judgment [235], at 14.] Having concluded that the summary judgment motions were redundant and unmanageable, the Court ordered that each Defendant file, after completion of the extended discovery period, a single motion for summary judgment addressing the claims asserted by

the Plaintiffs. (*Id.* at 19.) On June 21, 2006, Defendants filed their Renewed Motions for Summary Judgment, and they are now properly before the Court. (Motions for Summary Judgment [256] [257] [259] [262] [263]).

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *Herzog v. Castle Rock Entm't,* 193 F.3d 1241, 1246 (11th Cir. 1999). Once the moving party has met this burden, the non-movant must demonstrate that summary judgment is inappropriate by designating specific facts showing a genuine issue for trial. *Graham v. State Farm Mut. Ins. Co.,* 193 F.3d 1274, 1282 (11th Cir. 1999). The non-moving party "need not present evidence in a form necessary for admission at trial; however, he may not merely rest on his pleadings." *Id.*

The Court must view all evidence in the light most favorable to the party opposing the motion and must resolve all reasonable doubts in the non-movant's favor. *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.,* 894 F.2d 1555, 1558 (11th Cir.

1990). "[C]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury. . . ." *Graham,* 193 F.3d at 1282. "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." *Herzog,* 193 F.3d at 1246. But, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment for the moving party is proper. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Each Defendant argues that he is entitled to summary judgment on every one of Plaintiffs' claims. Defendants argue that Plaintiffs generally complain about their frustrations in the workplace and that none of their complaints are supported by evidence that Defendants intended to discriminate against white managers. Ordinarily, whether conduct constitutes discrimination is an issue best suited for a jury. The question that is presented to the Court in Defendants' summary judgment motions is whether Defendants have asserted legal arguments that allow them to avoid a jury considering, in whole or in part, the conduct Plaintiffs allege.[9]

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[9] Most legal arguments are made by all Defendants, therefore the Court considers these arguments in common to all Defendants together. Arguments uniquely asserted by an individual Defendant are noted in the relevant section.

B. Motions for Summary Judgment on Plaintiffs' Claims

1. *Plaintiffs' Conspiracy Claim*

Defendants argue that Plaintiffs' claim for conspiracy under 42 U.S.C. § 1985 fails because it is barred by the intracorporate conspiracy doctrine. "Under the intracorporate conspiracy doctrine, a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation." *Dickerson v. Alachua County Comm'n,* 200 F.3d 761, 767 (11th Cir. 2000). The doctrine applies to both private corporations and public entities. *Id.*; *see also Baker v. Chandler,* 161 F. Supp. 2d 1372, 1381 (S.D. Fla. 2001). "The . . . doctrine holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. Simply put, . . . a corporation cannot conspire with its employees, and its employees, when acting under the scope of their employment, cannot conspire among themselves." *McAndrew v. Lockheed Martin Corp.,* 206 F.3d 1031, 1036 (11th Cir. 2000). The issue presented is whether the intracorporate conspiracy doctrine applies to prevent Defendants from being capable of conspiring with one another. The Court holds that it does.

Dickerson is particularly instructive in the context of a conspiracy claim involving a public entity. In *Dickerson,* the plaintiff sued his county employer for demoting him in violation of his constitutional rights, asserting a variety of claims, including a

conspiracy under 42 U.S.C. § 1985, a civil rights action under § 1983, and race discrimination claims under § 1981 and Title VII. *Dickerson,* 200 F.3d at 764. The Eleventh Circuit addressed whether, under the intracorporate conspiracy doctrine, the defendant county and its employees could engage in a civil conspiracy to violate the plaintiff's civil rights under § 1985(3).[10] *Id.* at 765. The *Dickerson* court held that the county and its employees were a single legal entity, incapable of conspiring among themselves, and held that the intracorporate conspiracy doctrine barred the plaintiff's conspiracy claim. *Id.* at 770.

Plaintiffs argue that two exceptions to the intracorporate doctrine apply in this case to permit their conspiracy claims. These exceptions are: (1) the independent personal stake exception; and (2) the series of discriminatory acts exception. Plaintiffs rely only on *Dickerson,* which discusses both of the exceptions. In *Dickerson,* the Eleventh Circuit observed: "[O]ther circuits also have either held or considered holding corporate agents capable of conspiring in civil rights cases when those agents . . . have an 'independent personal stake' in the corporate

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[10] While Plaintiffs do not specify in their Complaint which subpart of § 1985 they are asserting, it is clear that their claim is based on § 1985(3), which prohibits conspiracies for the purpose of depriving persons of equal protection of the laws. *See* 42 U.S.C. § 1985(3); (Compl., at ¶ 104) (alleging that "Defendants conspired for the purpose of depriving Plaintiffs of equal protection of the laws. . . ."). The Court does not consider the Plaintiffs to have alleged any other form of conspiracy.

action, or engage in a series of discriminatory acts as opposed to a single action." *Id.* at 770. The Court went on to hold that "[b]ecause none of these exceptions would apply based on the facts of this case, *we do not reach the issue of whether to adopt them in this circuit.*" *Id.* (emphasis added); *see also Denney v. City of Albany,* 247 F.3d 1172, 1190-91 (11th Cir. 2001) (Marcus, J.) (applying the intracorporate conspiracy doctrine to plaintiff's claim for discriminatory failure to promote white employees because the actions related to defendants' performance of their official, not personal, duties and therefore they were acting as the city itself, not conspiratorially); *Baez v. Seminole County Sch. Bd.,* No. 6:05CV802ORL31KRS, 2005 WL 2105961, at *9 (M.D. Fla. 2005) (noting that the Eleventh Circuit and district courts within its Circuit have applied the doctrine to civil rights cases).[11] The *Dickerson* court expressly declined to

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[11] A "personal stake" exception to the intracorporate conspiracy doctrine was recognized in this circuit before *Dickerson*. *Dickerson*'s refusal to adopt the exception in a civil rights context now makes its application uncertain. In *H & B Equip. Co., Inc. v. Int'l Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978), the Fifth Circuit stated that an exception to the intracorporate conspiracy doctrine exists when corporate employees act for their own personal purposes rather than those of their employer. This exception, however, generally is applied in antitrust cases and in circumstances where the defendant had an independent economic stake in his actions. *See E.T. Barwick Indus., Inc. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1341 (N.D. Ga. 1987) (for antitrust purposes, an individual employee could not have conspired with the company to fix prices because the "personal stake" exception did not apply); *Palmer v. Gotta*

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hold the exceptions were applicable to this circuit. Plaintiffs rely on *Dickerson* as their only authority that the exceptions apply, and they have not cited any Eleventh Circuit decisions after *Dickerson* to persuade this Court that the exceptions should be applied in this case. *See McMillan v. DeKalb County,* No. 1:04-cv-3039-BBM (N.D. Ga. Feb. 14, 2005) (Martin, J.) (dismissing a nearly identical conspiracy count on the basis of the intracorporate conspiracy doctrine).[12] The intracorporate conspiracy

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Have It Golf Collectibles, Inc., 106 F. Supp. 2d 1289, 1301 n.21 (S.D. Fla. 2000) (in an antitrust conspiracy claim, noting that under the personal stake exception, a corporation can conspire with its agent when the agent was acting beyond the scope of his authority or for his own benefit, but finding the exception inapplicable to the case before it). Although two district court cases in this circuit have recognized the personal stake exception in a civil rights context, both were decided before *Dickerson*. *See Coley v. M & M Mars, Inc.*, 461 F. Supp. 1073, 1076 (M.D. Ga. 1978); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1539 n.33 (M.D. Ala. 1994). After *Dickerson*'s express refusal to adopt the exceptions, their viability as precedent is questionable.

[12] Even if the exceptions were viable in this circuit, they would not apply here. In cases where the personal stake exception was applied, the Defendants had an economic stake in the conspiracy. Plaintiffs do not allege any of the Defendants had an economic stake in the alleged conspiracy to discriminate. In fact, the only stake alleged was an unspecified political benefit for Jones, Drew's interest in attaining a Director position, and Defendants interest in keeping their jobs. The benefit is not capable of specification or calculation and is, at best, a speculative intangible prospect of a benefit which the law, this Court believes, should not recognize to support the application of this exception to the intracorporate conspiracy

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doctrine therefore applies, Defendants are incapable of conspiring with themselves, and Plaintiffs' conspiracy claim under § 1985 fails as a matter of law. Summary judgment is granted to each Defendant on this claim.

2. *Statute of Limitations for the Equal Protection and Intentional Race Discrimination Claims (Counts I & II)*

Each Defendant next argues that Plaintiffs' equal protection and race discrimination claims are barred by the applicable statute of limitations. They argue that because Plaintiffs must assert their claims under 42 U.S.C. § 1983, the statute of limitations is two years, and therefore Bryant's transfer claim, Drake's transfer and failure to promote claims, and Kelley's transfer and hostile work environment claims are time-barred. Plaintiffs argue that the statute of limitations for § 1981 claims applies, and limitations

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doctrine. For similar reasons, the Court concludes the "series of discriminatory acts" exception would not apply, even if it was viable in this circuit. Plaintiffs make a conclusory statement that Defendants "engaged in a series of discriminatory acts as opposed to a single action." Although Defendants are alleged to have engaged in a variety of acts pursuant to an agreement to discriminate against whites, there is an absence of any evidence that the parties agreed to a common purpose as opposed to acting according to an objective articulated by Jones for a benefit he sought to achieve. Whether there is sufficient evidence for a reasonable jury to find in favor of Plaintiffs on this claim is doubtful, even if there was authority to apply the exception in this case.

period applicable to § 1981 claims is four years – not two.

Plaintiffs' complaint alleges a "violation of 42 U.S.C. § 1981 as enforced by 42 U.S.C. § 1983."[13] (Compl., at ¶ 100.) This pleading form is required because the Eleventh Circuit has held in cases involving claims against government defendants that § 1983 provides the exclusive damages remedy for the violation of rights guaranteed by § 1981. *Butts v. County of Volusia,* 222 F.3d 891, 893 (11th Cir. 2000). "Congress created a catchall 4-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990, that do not contain statutes of limitations provisions." *Palmer v. Stewart County Sch. Dist.,* 178 Fed. Appx. 999, 1002-03 (11th Cir. 2006) (citing 28 U.S.C. § 1658 and *Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369, 371, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004)). Section 1981 was amended after December 1, 1990, and is likely covered by the catchall provision. Section 1983, however, does not have a statute of limitations provision, and it was not enacted or amended after December 1, 1990. *Id.* at 1003. Plaintiffs argue that since their claims are, at their core, § 1981 actions, the four-year limitations period should apply. Defendants argue the operative statute is § 1983, the vehicle for enforcing § 1981 claims against public

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[13] Plaintiffs also note in their Responses to Defendants' motions for summary judgment that they are bringing their § 1981 claims through the vehicle of § 1983.

defendants. The statute of limitations for § 1983, claims is "the statute of limitations given by state law, which, in Georgia, is two years." *Id.* (citing *Williams v. City of Atlanta,* 794 F.2d 624, 626 (11th Cir. 1986)); *see also* O.C.G.A. § 9-3-33. Thus, Defendants argue the Plaintiffs' equal protection and race discrimination claims – based on § 1981 and brought under § 1983 – are barred.

Plaintiffs rely on *Jones v. R.R. Donnelley & Sons Co.,* to support their argument that *all* § 1981(b) claims are governed by the four-year statute of limitations – even those brought through § 1983. While *Jones* supports the conclusion that the four-year catchall limitations period applies to § 1981 actions against private persons, the Supreme Court has been equally clear that where § 1983 is effecting the remedy for a civil rights violation, federal statutory law under 42 U.S.C. § 1988 "is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims. The federal interests in uniformity, certainty and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach." *Wilson v. Garcia,* 471 U.S. 261, 275, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1984).

Plaintiffs seek to discredit the reasoning in *Wilson* by relying on a footnote in *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 123, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005), a case brought under

the Federal Telecommunications Act. The *Abrams* footnote reads:

> The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal injury torts. . . . It may be, however, that this limitations period does not apply to respondent's § 1983 claim. In 1990, Congress enacted 28 U.S.C. § 1658(a), which provides a 4-year, catchall limitations period applicable to "civil action[s] arising under an Act of Congress enacted after" December 1, 1990. In *Jones,* we held that this 4-year limitations period applies to all claims "made possible by a post-1990 [congressional] enactment." Since the claim here rests upon violation of the post-1990 TCA, § 1658 would seem to apply.

Abrams, 544 U.S. at 123 n.5. Plaintiffs' reliance on the footnote is misleading. A more comprehensive reading of *Abrams* discredits the interpretation advanced by Plaintiffs. The respondent in *Abrams* argued that the rule that "§ 1983 claims are governed by the state law statute of limitations for personal-injury torts, does not apply to § 1983 actions to enforce statutes that themselves contain a statute of limitations." *Id.* at 124, 125 S.Ct. 1453. He urged that "the limitations period in the federal statute displaces the otherwise applicable state statute of limitations." *Id.* The Supreme Court rejected this reasoning:

> This contention cannot be reconciled with our decision in *Wilson,* which expressly rejected the proposition that the limitations

> period for a § 1983 claim depends on the nature of the underlying right being asserted. We concluded instead that 42 U.S.C. § 1988 is "a directive to select, in each State, the one most appropriate statute of limitations for *all* § 1983 claims." We acknowledged that "a few § 1983 claims are based on statutory rights," but carved out no exception for them.

Id. (citations omitted).

The Eleventh Circuit applied this reasoning in *Palmer,* 178 Fed. Appx. at 1002. In *Palmer,* the plaintiff asserted claims under Title VII, § 1981, and § 1983 against the defendant school district and Dr. Betty Ray, individually and in her official capacity. The plaintiff alleged that the defendants racially discriminated against her in pay and benefits. *Id.* The district court granted judgment as a matter of law to the school district and Ray on the plaintiff's Title VII, § 1981, and § 1983 claims because the claims were time-barred. *Id.* at 1001. Plaintiff argued on appeal that the district court erred in holding her § 1981 claim was barred by a two-year statute of limitations. *Id.* at 1002. She argued that the four-year catchall statute of limitations applied.[14]

The Eleventh Circuit acknowledged that the four-year catchall statute of limitations applied to

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[14] The *Palmer* plaintiff did not challenge the dismissal of her Title VII claim.

statutes enacted after December 1, 1990, that do not contain their own statute of limitations provision. Because § 1981 was amended by the Civil Rights Act of 1991, the Court raised the question whether the four-year catchall provision might apply. *Id.* The critical issue as to which limitations period applied, in the Court's mind, was whether the plaintiff's cause of action against Ray in her individual capacity arose under the 1991 Act amending § 1981, or whether it arose under the original version of § 1981. The court remanded the case for consideration of that issue. *Id.*

The Court then noted "[a]s previously stated, a § 1981 claim against a state actor must be brought under § 1983. Therefore, [plaintiff] has no cause of action under § 1981, except against Ray in her individual capacity." *Id.* The court noted that the two-year state statute of limitations applies to § 1983 claims, holding that "with the exception of the dismissal of the § 1981 claim against Ray in her individual capacity, we affirm the dismissal of the [claims] as time-barred." *Id.*[15]

In so holding, the Eleventh Circuit acknowledged that "[s]ection 1983 provides the sole cause of action against state actors for violating § 1981." *Id.* (citing *Butts v. County of Volusia,* 222 F.3d 891, 892-94 (11th

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[15] The *Palmer* opinion is not entirely clear whether the plaintiff in *Palmer* brought an action against the school district under § 1983 enforcing § 1981, or whether the plaintiff simply asserted both § 1981 and § 1983 claims against the defendants.

Cir. 2000)); *see also AUI, LLC, v. DeKalb County,* No. 1:05-cv-2273-BBM (N.D. Ga. Aug. 28, 2006) (Martin, J.) (holding that plaintiff's cause of action properly arises under § 1983, not § 1981, since § 1983 is the exclusive remedy against state actors for violations of § 1981 and applying the two-year statute of limitations to plaintiff's claims); *Marshall v. Daleville City Bd. of Educ.,* No. 1:05cv386-WHA, 2006 WL 2056581, at *2 (M.D. Ala. July 24, 2006) ("Section 1981 claims against state actors must be brought pursuant to § 1983 ... Therefore, the statute of limitations for a § 1981 claim asserted pursuant to § 1983 is governed by state law."). Because Plaintiffs bring their claims for violation of § 1981 through § 1983, as they must against state actors, the Court concludes that the two-year statute of limitations for § 1983 actions applies to Plaintiffs' claims.[16]

Applying the two-year limitations period, Defendants argue that Bryant's transfer claim, Drake's transfer and failure to promote claims, and Kelley's

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[16] In response to Defendants' motions for summary judgment asking the Court to apply the two-year statute of limitations to all Plaintiffs' claims, Plaintiffs do not contend that they also assert § 1981 claims against Defendants in their individual capacities. In fact, they state that they bring their § 1981 claims through § 1983. Because Plaintiffs have abandoned this individual capacity argument, the Court does not consider whether those claims would be time-barred under the limitations period applicable to § 1981 actions.

demotion and hostile work environment claims are barred.[17] They argue: (1) Plaintiff Kelley was transferred to the Greenspace program in February 2002. Because the Complaint was filed on August 24, 2004, more than five months after the two-year statute of limitations expired, Kelley's discriminatory transfer claim is barred; (2) Kelley's hostile work environment fails because an act contributing to the hostile work environment must have occurred within the limitations period, and Kelley does not identify any evidence of any such act occurring after August 24, 2002. The Court agrees that Kelley has not alleged sufficient facts occurring within the limitations period to support her demotion claim, and summary judgment is granted on Kelley's demotion claim.

Kelley does, however, allege an act contributing to her alleged hostile work environment which occurred within the limitations period. She alleges

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[17] Williams also argues that Bryant's hostile work environment claim arose no later than February 2002, and therefore it is time-barred. Williams misinterpret's [sic] Plaintiffs claims in this action and attempts to treat each act complained of by Bryant as a separate cause of action instead of viewing the denial of compensatory time and failure to allow Bryant to return to work as part of Bryant's claim for a hostile work environment. In fact, one of the actions Bryant alleges contributed to his hostile work environment is Drew's act of preparing termination letters for him and intimidating him by leaving their contents open so that Bryant could see them. This occurred in 2004, and since this act took place within the limitations period, Bryant's hostile work environment claim is not time-barred.

she was constructively discharged, which occurred when she gave her resignation on September 25, 2002.[18] *See Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 105, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) (holding, in the context of the timing of filing a charge of discrimination with the EEOC, that if an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for purposes of determining liability).

"Constructive discharge negatively affects an employee's job status, and therefore constitutes an adverse employment action. In other words, where working conditions are so intolerable that a

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[18] Plaintiffs also argue, by way of their response to Defendants' Statement of Material Facts, that an additional act contributing to Kelley's hostile work environment occurred within the limitations period. (II Pl. SMF, at ¶ 35.) Plaintiffs state that during the Spring of 2002, Kelley received approval from Stogner to relocate her office to Arabia Mountain, Georgia, in order to work on the Arabia Mountain Project. Kelley began to set up an office there in anticipation of relocating. (*Id.*) Kelley claims, without specifying a date, that in the summer of 2002, Kelley was told by Tina Arbes that she could not relocate to Arabia Mountain. (*Id.*) Kelley believes this was part of Defendants' plan to frustrate her so that she would terminate her employment. Plaintiffs failed to present this evidence in response to Stogner's motion for summary judgment, and Plaintiffs did not specify any dates for these actions other than one seasonal reference. "Summer of 2002" is too vague to provide sufficient evidence that this was an act contributing to the hostile work environment which occurred between August 24 and September 25, 2002. It may, however, be considered along with all other contributing evidence because Kelley's constructive discharge occurred within the limitations period.

reasonable person would have felt compelled to resign, the employer's conduct is an adverse employment action." *Akins v. Fulton County,* 420 F.3d 1293, 1300-01 (11th Cir. 2005); *see also Rowell v. Bellsouth Corp.,* 433 F.3d 794, 805 (11th Cir. 2005) ("[T]he doctrine of constructive discharge enables an employee who has resigned to demonstrate that he suffered an adverse employment action by showing that the resignation was an involuntary response that was the product of intolerable working conditions – that is that he had only a choice between retirement and discharge."); *Van Der Meulen v. Brinker Int'l,* 153 Fed. Appx. 649 (11th Cir. 2005); *Mitchell v. Overbey,* 2005 U.S. Dist. LEXIS 17489, at *19 (M.D. Ga. 2005), *aff'd by Mitchell v. Pope,* 189 Fed. Appx. 911, 2006 U.S. App. LEXIS 17868 (11th Cir. July 14, 2006) (holding that because plaintiff's constructive discharge occurred within the 180-day limitations period for filing an EEOC complaint, the complaint for hostile work environment and constructive discharge was timely filed, and the Court would consider all of the allegations pertaining to any acts by defendants contributing to the hostile work environment). Because Kelley offers evidence that her constructive discharge, an act contributing to her hostile work environment, occurred within the limitations period, the Court finds that her hostile work environment claim is not time-barred. *See Scott v. Lee Cty. Youth Dev. Ctr.,* 232 F. Supp. 2d 1289, 1296-97 (M.D. Ala. 2002) (noting that, under the Supreme Court's decision in *Morgan,* in theory, Plaintiffs should be

able to contend their constructive discharge was a component act of their hostile work environment).

Drake was transferred to the position of Assistant Director of Parks and Recreation in February 2002. The Director of Parks and Recreation position opening was posted on February 25, 2002 and closed on March 8, 2002. Defendant Drew was promoted to the position on March 16, 2002. The Complaint was filed on August 24, 2004. The Court agrees that both Drake's discriminatory transfer and failure to promote claims accrued more than two years after the Complaint was filed and are time-barred.

Bryant was assigned to his Recreation Services duties on June 10, 2002. The Complaint was filed on August 24, 2004, therefore Bryant's discriminatory transfer claim also is barred by the statute of limitations.

Plaintiffs seek to avoid these statute of limitations bars by arguing that their claims are tolled by the discovery rule and the continuing tort doctrine. They rely on *Mullinax v. McElhenney* for the proposition that the statute of limitations for a § 1983 claim does not begin to run on the date the acts occurred, but rather when the Plaintiffs realize (a) they are injured, and (b) that Defendants inflicted the injury. 817 F.2d 711 (11th Cir. 1987). Bryant, Drake and Kelley claim they did not learn until 2004 that they were injured by Defendants' alleged discriminatory conduct.

When a § 1983 action accrues is a matter of federal law. *Mullinax,* 817 F.2d at 716. "The statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.* (citations and quotations omitted). Therefore, a § 1983 action does not accrue until the plaintiff "knows or has reason to know that he has been injured . . . [and] until the plaintiff is aware or should have been aware who has inflicted the injury." *Id.*

The discovery rule does not save Plaintiffs' claims here. Kelley testified she believed, at least by February 2002, that she had been discriminated against because of her race. (Kelley Dep., attached to Ex. to Pl. SMF Vol. 1 as Ex. J, at 131-32.)[19] Drake

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[19] Plaintiffs point to a paragraph in Plaintiff Kelley's affidavit as evidence that she did not learn until 2004 that she was injured by Defendants' conduct. The paragraph cited is insufficient to create a genuine issue of material fact about whether Kelley knew she had been injured and who had injured her. In fact, Kelley states in her affidavit that she repeatedly spoke with and complained to Stogner about the hostile work environment and racial discrimination she was experiencing, and that she met privately with Defendant Stone as far back as July 2001 to report her complaints. (Kelley Aff., attached to Ex. to Pl. SMF as Ex. D, at ¶ 25.) Kelley's affidavit and other testimony demonstrates she was aware she was experiencing an injury, that she knew who was responsible for it and believed the conduct she experienced was motivated by discrimination. The fact that the proof of her suspicions improved when Plaintiff Lowe came forward in the spring of 2004 does not affect what

(Continued on following page)

testified that when he was passed over for promotion and transferred, he "certainly thought at that time that race was an issue." (Drake Dep., attached to Ex. to Pl. SMF as Ex. K, at 157.) Bryant testified that when his office was moved to Tucker, around May of 2002, he thought he was being discriminated against. (Bryant Dep., at 438-440.) The necessary conclusion reached here is that Kelley, Bryant and Drake all were aware, before August 24, 2002, they had been injured because of Defendants' actions, knew who had made the adverse employment decisions affecting them, and believed the adverse action taken was race discrimination.

Plaintiffs Kelly, Drake and Bryant next argue that the statute of limitations does not bar these claims because they constitute continuing torts, and the limitations period does not accrue until the elimination of the continuing tort – the pattern of mistreatment – which continued beyond August 24, 2004.[20] The continuing tort doctrine tolls the

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she knew and when she knew it for purposes of the Court's limitations period analysis.

[20] "In Section 1983 cases, the length of the limitations period, and the closely related questions of tolling and application, are to be governed by state law." *Griffin Indus., Inc. v. Couch*, 2006 WL 783354, *4, n.4, 2006 U.S. Dist. LEXIS 17285, at *16 n.4 (N.D. Ga. Mar. 23, 2006) (citing *Wilson*, 471 U.S. at 276-77, 105 S.Ct. 1938). Determining when a § 1983 claim accrues is a question of federal law. *Id.* (citing *Mullinax* and noting that while Plaintiff characterized the discovery rule as a tolling mechanism under Georgia law, Plaintiff was actually referring to the issue of when its § 1983 claim accrued under federal law).

limitations period where the injury resulting from a tortious act is not immediately apparent, and the victim could not in the exercise of ordinary care have learned of it. *Everhart v. Rich's,* 229 Ga. 798, 802, 194 S.E.2d 425 (1972).

In *Everhart,* plaintiffs claimed personal injury and property damage caused by a set of draperies sold by the defendant. The plaintiffs alleged that they became ill years after hanging the draperies in their bedroom. They claimed that when they became ill, they first discovered that billions of particles had broken loose from the draperies, the particles had been carried through the house, and it was these particles that caused their physical injury and property damage. Their action was based on the Defendant's alleged failure to warn of the danger from the particles. The Defendant argued the action was barred by the applicable statute of limitations.

The Georgia Supreme Court in *Everhart* held that when continued exposure is caused by a continued failure to warn, the tort is of a continuing nature. Where a tort is continuing in nature, the statute of limitations does not begin to run until "such time as the continued tortious act producing injury is eliminated, e.g. by an appropriate warning in respect to the hazard." *Everhart,* 229 Ga. at 802, 194 S.E.2d 425; *see also Ballew v. A.H. Robins Co.,* 688 F.2d 1325, 1327-28 (11th Cir. 1982) (overturning district court's grant of summary judgment based upon statute of limitations defense in a personal injury case involving an intrauterine device implanted in

plaintiff because of continuing nature of tort and absence of warning).

The Georgia law continuing tort theory simply does not apply to Plaintiffs' claims. The continuing tort theory applies where a plaintiff could not have discovered the injury the plaintiff alleges to have suffered, such as where a doctor leaves a sponge inside a patient during surgery or where draperies release invisible and harmful particles into the air without the plaintiff's knowledge. The continuing tort doctrine does not apply to Kelley's wrongful transfer claim, Drake's transfer and failure to promote claims and Bryant's transfer claim because they each were aware of the injury more than two years before the Complaint was filed. *See Everhart,* 229 Ga. at 802, 194 S.E.2d 425; *Harrison v. Beckham,* 238 Ga. App. 199, 204, 518 S.E.2d 435 (1999) ("Georgia courts have consistently held that in a continuing tort a cause of action accrues when a plaintiff discovers, or with reasonable diligence should have discovered, both the injury and the cause thereof.")

Plaintiffs Kelley, Drake and Bryant also rely on two federal cases from this district applying a continuing tort theory in a different context. In *Coleman v. Miller*, an African-American plaintiff sued the governor and the State of Georgia for civil rights violations under § 1983, among other statutes, claiming the Georgia state flag, which displayed the Confederate battle emblem, violated his equal protection, First Amendment, and other civil rights. 885 F. Supp. 1561, 1568 (N.D. Ga. 1995). The defendants in

Coleman argued that Georgia's two-year statute of limitations for personal injury barred the plaintiff's claims. The district court held, without elaboration or explanation, that under the continuing tort doctrine, the claims were not time-barred. *Id.* The Court does not find the decision in *Coleman* helpful on this issue. The facts of the case are not well-developed, and the greater weight of the authorities and the Court's reasoning based on them results in the conclusion that the continuing tort principle does not apply here.

Plaintiffs also rely on *S.W. Daniel, Inc. v. Urrea,* 715 F. Supp. 1082 (N.D. Ga. 1989). In *S.W. Daniel,* the defendant special agent, in an action for malicious interference with business and contractual relations, argued that the plaintiffs' claims were barred by the two-year statute of limitations. 715 F. Supp. 1082 (N.D. Ga. 1989). The plaintiffs had alleged that the defendant had engaged in a series of actions designed to interfere with their business and contractual relations during a criminal trial against them beginning in July 1984 and continuing through November of 1986. *Id.* at 1084. The plaintiff claimed that the defendant's false testimony during pretrial hearings, which occurred less than two years from the filing of the complaint, was one such criminal activity on which the Plaintiff's claims were based. The plaintiffs argued that they had alleged a continuing tort which ended less than two years before filing of the complaint, and thus their claims were not time-barred.

The *S.W. Daniel* court noted that whether the defendant's earlier actions of seizing documents, foreclosing a supplier, and censuring advertisements constituted a continuing tort was a question of federal law and that "a cause of action for a continuing tort accrues when the wrongful conduct terminates. The continuing tort principle addresses itself to persistent wrongful conduct, not mere persistent injury accruing from an earlier wrong." *Id.* at 1087. Typical examples of persistent wrongful conduct – as applied to persistent tort injury – are persistent denials of medical care and conduct constituting a pattern of mistreatment, such as refusing to provide psychiatric or other medical care, shower, telephone or visiting privileges to a prisoner. The court observed that "[o]ther wrongs which cause harm into the future, but nevertheless result from a single act of misconduct, are not continuing torts in the absence of continuing illegal acts." *Id.* Acknowledging this distinction, the *S.W. Daniel* court found there was no continuing tort. *Id.; see also Delaware State College v. Ricks,* 449 U.S. 250, 257, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) (holding no continuing tort occurred where plaintiff alleged an "ongoing violation" of his civil rights, because "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination" and that plaintiff must identify the alleged discriminatory acts that continued until termination of his employment).

Plaintiffs Kelley, Drake and Bryant do not allege a continuing tort under federal law. Discriminatory

transfer, failure to promote, demotion and hostile work environment claims all are based, as here, on individual, discrete acts of alleged discrimination.[21] While Plaintiffs allege persistent discrimination over a period of time, that is not sufficient to invoke the continuing tort exception to the application of the statute of limitations. "The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Ricks,* 449 U.S. at 258, 101 S.Ct. 498 (noting that while the complaint did allege a variety of unusual incidents occurring within the limitations period, including one where plaintiff was physically attacked by the education department chairman, these incidents were not independent acts of discrimination).

Plaintiffs' blanket conclusory statements that they did not learn until 2004 that they were injured by Defendants' discriminatory conduct, are not

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[21] The law is settled regarding the statute of limitations for Plaintiffs' claims for hostile work environment. If one act contributing to a plaintiff's hostile work environment occurs within the statute of limitations period, all conduct contributing to the hostile work environment may be considered. The Supreme Court has noted the different nature of hostile work environment claims as compared to discrete acts of discrimination. "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Morgan,* 536 U.S. at 123, 122 S.Ct. 2061.

enough to avoid the limitations period bar. The evidence further shows that they knew before August 24, 2002, of the injuries they allege to have suffered, who caused the injuries and the suspected motivation behind the conduct. Kelley's transfer claim, Drake's transfer and failure to promote claims, and Bryant's reassignment claims are time-barred and are required to be dismissed. Summary judgment is granted to each Defendant on these claims.

3. *Bryant, Drake, and Kelley's Hostile Work Environment Claims*

Defendants next argue that Bryant, Drake, and Kelley have failed to put forth sufficient evidence to sustain a claim for a racially hostile work environment. To establish a hostile work environment claim under Title VII, a plaintiff must show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment was based on a protected characteristic of the employee, such as the employee's race; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or direct liability. *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1279-80 (11th Cir. 2003) (citing *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002)).

Defendants first challenge the third element of a hostile work environment claim, arguing that Bryant, Drake, and Kelley have failed to put forth evidence, aside from their own speculation, that any of the acts they complain of were race-based. The Court disagrees. Plaintiffs have presented sufficient evidence to create a genuine issue of fact as to whether the acts complained of by Plaintiffs were motivated by race. The evidence that Defendants targeted Bryant, Drake, and Kelley based on their race is unusually compelling.

For example, Lowe testified that Stone told Lowe after he was hired that other white persons, even if they had been interested in his job, would not have been considered for his job. (Pl. SMF, at ¶ ; Lowe Dep., attached to Ex. to Pl. SMF as Ex. N, at 127.) Drew, upon welcoming Lowe to DeKalb County, told him that they were eliminating the existing white people in the Parks Department and replacing them with black managerial employees because the CEO's agenda was to get reelected, and Stone was making sure the agenda was executed. (Pl. SMF, at ¶ 17; Lowe Dep., at 139-40.) Jones stated to Lowe on multiple occasions that he wanted a "darker administration." (Pl. SMF, at ¶ 17, Lowe Dep., at 381.) Jones also referred to Plaintiff Bryant as a "white bastard." (Pl. SMF, at ¶¶ 18-19; Lowe Dep., at 354.) Defendant Drew told Lowe that she did not trust the white employees in her department and asked him to "dig up dirt" on white employees. (Pl. SMF, at ¶ 18; Lowe Dep., 476-77.)

Lowe also testified that Drew told Lowe that she transferred Bryant into a position involving recreation because Bryant did not know anything about recreation, and thus Drew believed Bryant would be perceived as incompetent. Drew told Lowe not to speak with Drake about important issues because she wanted to keep him in the dark hoping he would fail in his recreation position. (Pl. SMF, at ¶ 18; Lowe Dep., at 515.) Before department meetings, Drew would meet with Lowe to discuss how she could frame issues so as to annoy Bryant and Drake. (Lowe Dep., at 516.) Defendants Jones, Stone, Drew and Williams, on separate occasions, each told Lowe that there was a plan to discriminate against white employees in DeKalb County, and that Defendants called the reassignment of Plaintiffs' duties a "reorganization." Defendant Stone told Lowe there were ways to get rid of employees without firing them. (Lowe Aff., attached to Ex. to Pl. SMF as Ex. C, at ¶¶ 10-11.)

The evidence of the large increase in black employees in the departments over which Jones had control during his tenure, and the corresponding reduction, albeit slight, in the number of white employees, constitutes corroborating evidence of racially motivated conduct. (Pl. SMF, at ¶¶ 73-79.) Plaintiffs have met their burden to come forward with evidence that would allow a reasonable jury to conclude the acts complained of by Plaintiffs were motivated by race.

Defendants next argue that Plaintiffs have not shown the fourth hostile work environment element – that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment. The Eleventh Circuit, in *Mendoza v. Borden,* 195 F.3d 1238 (11th Cir. 1999), observed: "[e]stablishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component." *Id.* at 1246. That is, considering all the circumstances, "[t]he environment must be one that a reasonable person would find hostile or abusive and that the victim subjectively perceives to be abusive." *Id.* (citations and quotations omitted). The *Mendoza* Court identified "four factors that should be considered in determining whether harassment objectively altered an employee's terms or conditions of employment: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Id.* (citing *Allen v. Tyson Foods,* 121 F.3d 642, 647 (11th Cir. 1997)). Courts are required to view the conduct in context, not as isolated acts, and make a decision based on the totality of the circumstances. *Id.* "Only when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working

environment is the law violated." *Barrow v. Ga. Pacific Corp.*, 144 Fed. Appx. 54, 56 (11th Cir. 2005) (quotations and citations omitted).

Taking the facts in the light most favorable to Bryant, he has put forth the following evidence regarding his hostile work environment claim: Bryant's responsibilities were significantly reduced by Drew in June when she issued her memorandum of temporary assignments (Pl. SMF, at ¶ 138); Drew treated white subordinates differently than black employees, at one time requiring a white employee to write a memo of explanation when she brought her grandchild in the office while not requiring black employees to do the same (*Id.* at ¶ 139); Drew isolated white deputy directors from decision making while seeking increased input from black deputy directors (*Id.* at ¶ 141); Drew required white employees to schedule appointments to speak with her while giving black employees free access; Drew gave preference to black employees to attend conferences; Drew gave preference to black employees for leadership positions; and Billups, a black employee with less tenure, was hired at a higher salary than Bryant. (*Id.*)

Bryant further alleges in support of his hostile work environment claim that Drew's actions included: denying Bryant's staffing requests, withholding staffing, information and computers from him, denying him comp time when Bryant had surgery, refusing to allow Bryant to return to work after his surgery when he requested and making him wait an

additional week to return, assigning subordinates duties without his knowledge, excluding him from meetings and discussions, failing to prepare his performance evaluation which would allow him to get a raise, intentionally framing discussions in meetings to frustrate and annoy him, and threatening Bryant by preparing suspension letters for him and carrying them so that Bryant saw their contents. (*Id.* at 142-43, 147, 149-50.)

Taking the facts in the light most favorable to Drake, the following acts contributed to his hostile work environment: Drew removed from Drake the responsibilities of an assistant director – the second most senior manager in the Parks Department – and instead treated him as a lower-level deputy director; Drew told all department deputy directors to report directly to her instead of Drake – a policy inconsistent with his job description; Drew removed Drake as the Parks Department's representative to the bond program – a responsibility he had since 1986; Drew did not allow Drake to participate in the hiring of deputy directors, even though he was the Assistant Director; Drew did not seek input from Drake regarding the reorganization of the Parks and Recreation Divisions; Drew hired Drake's subordinates without his knowledge or input; Drew restricted Drake from speaking to the media, giving this responsibility instead to Lowe, Drake's subordinate; Drew delegated to Lowe the responsibility to run the Parks Department when Drew was gone, instead of allowing Drake, the Assistant Director to

exercise this delegated authority; Drew placed a memo in Drake's file stating that Drake had left the office on an "unauthorized doctor's appointment," apparently because he had told her that he had a sinus infection, but the doctor instead diagnosed Drake with "acute asthmatic bronchitis;"[22] Drew excluded Drake from discussions regarding DeKalb County's golf course management and revenue even though this area was Drake's responsibiiity; Drew did not provide Drake with a performance appraisal or work plan; and Drew intentionally sought to aggravate and annoy Drake in department meetings.

Taking the facts in the light most favorable to Kelley, she offers the following evidence to support her hostile work environment claim: Defendant Jones angrily confronted her on several occasions, and on one occasion, Jones approached her, yelling and screaming in a physically threatening manner (Pl. SMF, at ¶ 102); Jones told Kelley not to speak to the press as Parks Department Director or speak with members of the Board of Commissioners, though her previous job duties included these tasks (Pl. SMF, at ¶¶ 103-104); Stogner told Kelly that she didn't

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[22] When questioned about the memo, Drew was evasive and denied directing her secretary to place the negative information in Drake's file. She implied that her secretary might have decided Drake's doctor's appointment was unauthorized and written the memo on her own. Drew testified that she had no memory of the memo and that she could not speak to the relevance of placing such a comment in Drake's file. (Drew Dep., at 179-186.)

understand the geopolitical issues of DeKalb County and that she could not relate to powerful black men (Pl. SMF, at ¶ 105); Stogner also told Kelley that Jones wanted to showcase black parks and black employees, implying that Jones did not want white employees, including her, to represent the Parks Department (*Id.* at ¶ 116); Kelley was not permitted to make hiring decisions or to conduct applicant interviews on her own; Williams told Kelley that a white candidate could not be recommended for the position of Deputy Director of Recreation because Jones would not accept it (Pl. SMF, at 110); After Drew was hired to fill the Deputy Director position, Jones and Williams isolated Kelley by bypassing her in the decision-making process and by communicating directly with Drew (Pl. SMF, at ¶ 114); Kelley was demoted from her position as Director of the Parks Department and reassigned to the Greenspace group where she was to work in a group with no title and no supervisory authority (*Id.* at ¶ 121); Kelley's proposals for the Greenspace bond program were repeatedly rebuffed by Stogner and her supervisor, Tina Arbes; Kelley was designated to be moved from her former Director's office into a small, windowless office that used to be a storage area (Pl. SMF, at ¶ 131); Stogner approved Kelley's request to move her office to Arabia Mountain and allowed her to spend money preparing, then withdrew permission at the last minute in order to frustrate Kelley, Kelley's transfer to the Greenspace group was personally and professionally humiliating, and it was uniformity [sic] perceived as a demotion (*Id.* at ¶ 127, 129, 132); Kelley

eventually had no meaningful job responsibilities and her duties were reduced to spending most of her time "coloring maps." (*Id.* at 133.)

The Court first finds that Bryant, Drake, and Kelley subjectively believed[23] they were being harassed based on their race.[24] Thus the Court's focus is on the objective component. The Court is required to look at the conduct in context, not as isolated acts and to evaluate on the totality of the circumstances whether Plaintiffs have put forth sufficient evidence for a reasonable jury to find that the conduct was sufficiently severe and pervasive. The Court concludes they have.

Bryant, Drake, and Kelley do not complain about random, isolated incidents occurring over several years. The alleged conduct occurred with significant frequency – many of the "incidents" occurred repeatedly

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[23] Kelley, Bryant and Drake have presented evidence that they found the actions subjectively offensive, as demonstrated by their testimony and Bryant's EEO complaint against Drew for creating a hostile work environment.

[24] This is a unique case in that there is significant evidence of a plan to discriminate, but the actions, while offensive and harmful, were neutral on their face. The Court concludes there is sufficient evidence of hostile work environment for this case to be submitted to a jury, noting that Title VII's objective of prohibiting race discrimination in the work place would be thwarted if a supervisor were able to embark on a plan to wrongfully discriminate, but avoid accountability by carefully characterizing discrimination as the restructuring or reorganization of a workforce and avoiding obviously racial references or comments.

and constantly beginning in early 2001. Bryant and Drake both submit evidence that their job responsibilities, especially their supervision and leadership authority, were drastically limited by Drew. Kelley submits evidence that her supervision and leadership authority were drastically limited by Jones, Stogner, and Williams. The severity of the conduct is evidenced by the fact these actions were taken by Bryant, Drake, and Kelley's superiors – the people who had authority to adversely affect their employment. "When the conduct in question is that of a supervisor, even isolated instances may more clearly rise to the level of actionable harassment." Lex K. Larson, Employment Discrimination 52-13, at § 52.03 Vol. 3 (2nd ed. 2006).

Although no physically threatening or humiliating actions were taken publicly against Bryant or Drake[25] and no racially derogatory comments were made directly to any of the three, this is the only factor not shown by Plaintiffs' evidence. The actions alleged significantly altered the terms and conditions of Bryant, Drake, and Kelley's employment by undermining their ability to perform their job, removing responsibilities from them, and hampering their ability to perform their supervision function to the point that Plaintiffs barely had any responsibility left. *See Croker v. Boeing Co.*, 437 F. Supp. 1138, 1193

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[25] Kelley does allege an incident where Jones screamed at her and approached her as if he was going to hit her.

(E.D. Pa. 1977) (holding the "overwhelming evidence of harassment . . . included unusually close supervision, denied transfer requests, reprimands concerning dress, use of racially demeaning language and an attempt to prevent [the plaintiff] from obtaining a promotion" was sufficiently severe and pervasive). Plaintiffs present evidence that these actions degraded their credibility, authority and stature in the positions they held, and even though the acts were disguised as neutral managerial decisions, Plaintiffs offer significant evidence that the harassment was based on race. In fact, Plaintiffs submit evidence that Defendants intended to engage in discrimination carefully calculated to cause Plaintiffs to terminate their employment. The Court here concludes that the environment alleged by Bryant, Drake, and Kelley in which white managers were treated with hostility and black managers were favored, especially where the terms and conditions of Plaintiffs' employment were so severely altered, could be perceived by a reasonable jury to be pervasively and discriminatorily hostile and abusive.

Plaintiffs' claims differ from those in the cases relied on by Defendants to support their argument that the conduct here is not sufficient to meet the objective standard. In the cases cited by Defendants, the acts complained of were isolated over several years and did not sufficiently alter the terms and conditions of the plaintiff's job. *See Barrow,* 144 Fed. Appx. at 56 (finding no hostile work environment where plaintiff gave evidence of isolated, sporadic

instances of racial harassment over his more than fourteen years of employment); *Mendoza*, 195 F.3d at 1248 (holding that plaintiff did not endure conduct that was so severe or pervasive that it altered the terms or conditions of her employment and that three of the four factors of a hostile work environment – physically threatening or humiliating conduct, interference with job performance, and severity – were absent). Viewing the evidence in the light most favorable to Plaintiffs and resolving all reasonable doubts in Plaintiffs' favor, the Court concludes that, under the totality of the circumstances, Plaintiffs have put forth sufficient evidence to show a genuine dispute of material fact exists regarding Kelley, Bryant and Drake's hostile work environment claims and that a reasonable jury could find an actionable hostile work environment. Defendants are therefore not entitled to summary judgment on these hostile work environment claims.

Individual Defendant Culpability

Defendants Jones, Williams, Stogner and Stone each argue that Bryant and Drake cannot show that they personally participated in the alleged constitutional violation or that there is a causal connection between their actions and the violation alleged. Drew argues that there is no evidence that she personally participated in Kelley's hostile work environment and that there is an insufficient causal connection between Drew's conduct and Kelley's harassment claim.

"It is axiomatic, in section 1983 actions, that liability must be based on something more than a theory of respondeat superior." *Brown v. Crawford,* 906 F.2d 667, 671 (11th Cir. 1990). "Supervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation." *Id.* This causal connection can be shown "when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so." *Id.* (finding no "obvious, flagrant, rampant" and continued abuse and that prison supervisors were unaware of any problems, therefore there was no supervisory liability); *see also Cross v. Ala. Dep't of Mental Health,* 49 F.3d 1490, 1508 (11th Cir. 1995) (finding liability under § 1983 where supervisors were on notice of the need to correct the discrimination and failed to do so, stating that the deprivations that constitute widespread abuse sufficient to notify the supervising official were obvious, flagrant, rampant and of continued duration, rather than isolated occurrences).

Jones's Role in the Alleged Hostile Work Environment

Plaintiffs have offered evidence that Jones told Lowe that it was his plan to advance his political objectives by increasing the number of black county managers and eliminating whites [sic] managers from county positions. (Lowe Dep., at 139, 353.) Lowe

testified that Jones stated on multiple occasions in his presence, and in the presence of Williams, Stone and Drew, that he wanted a "darker administration." (Lowe Dep., at 381.) Jones allegedly told Lowe that "we don't fire people around here; we eliminate their position." (Lowe Dep., at 339.) Lowe also testified: Jones called Bryant a "white bastard who's nothing more than a racist and need[s] to go." (Lowe Dep., at 353-54.) Jones told Lowe that he did not like Kelley because she eliminated black people from the parks of DeKalb County, thereby allowing white associations to control the parks, and that the relationship between Kelley, the white associations and the parks needed to be dismantled. (Lowe Dep., at 354.)

This evidence is sufficient to demonstrate that Jones, as CEO of DeKalb County, was aware of the pervasive hostile work environment that was being instituted.[26] This evidence is sufficient to show that there is a causal connection between Jones and the alleged hostile work environment experienced by Drake, Bryant, and Kelley. Jones's motion for summary judgment on Bryant, Drake, and Kelley's hostile work environment claim is therefore denied.

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[26] Plaintiffs argue that Jones created the discriminatory hostility. A jury will have to evaluate ultimately whether discrimination occurred and, if so, who was responsible for it. The Court simply finds there is sufficient evidence to prohibit summary judgment in favor of Jones on this claim.

Drew's Role in the Alleged Hostile Work Environment

First, the Court finds the evidence clearly is sufficient for a jury to determine Drew's accountability for the adverse employment action alleged by Bryant and Drake.[27] Plaintiffs' evidence is sufficient to show that Drew was not only aware of and supported the discriminatory objective of increasing the number of black county managers by eliminating white managers, but she played a prominent role in the violations alleged by Bryant and Drake.

As for Kelley's hostile work environment claim, the evidence of Drew's involvement consists of an incident where Drew attempted, after becoming Director, to have Kelley removed from her office and placed into a much smaller office that formerly was used as a storage area. Plaintiffs' evidence indicates that the decision to transfer Kelley to the Greenspace program was not made by Drew, but was made before Drew became Director of the Parks Department. After Kelley was transferred to the Greenspace program, she reported, through Tina Arbes, to

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[27] Drew also argues that various actions named by Bryant as evidence of Drew's harassment and disparate treatment of him are not adverse actions, including the failure to provide a performance review, denying his requests to use compensatory time, and refusing to grant his request to return to work on light duty after surgery. (Drew MSJ, at 23.) The Court finds these acts may have, when viewed in an overall context, contributed to the hostile work environment claim even though they may not constitute discrete, actionable acts of discrimination.

Defendant Stogner – not Drew.[28] The evidence, therefore, is that Drew did not have supervisory authority over Kelley and was not otherwise sufficiently connected to the acts Kelley alleges contribute to her hostile work environment to hold Drew liable for acts complained of by Kelley. Accordingly, Drew's motion for summary judgment on Kelley's hostile work environment claim is granted.

Williams's Role in the Alleged Hostile Work Environment

Defendant Williams argues that there is no evidence that he was responsible for the alleged hostile environment alleged by Drake, Bryant, and Kelley. (Williams MSJ, at 15, 27.) Plaintiffs' evidence of Williams' involvement in Drake and Bryant's hostile work environment, taken in the light most favorable to them, is: Williams told Lowe that Lowe was expected to be a "team player" and to assist in their efforts to eliminate white employees (Pl. SMF, at 21); Stogner told Kelley to offer Drew a salary higher than Bryant so she could "get in good" with

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[28] Kelley states in her affidavit that Drew was involved in the day-to-day operations of the Greenspace program because she was responsible to Williams for its implementation. (Kelley Aff., at ¶ 24.) Kelley cites Jones's February order as evidence, but the order does not support such a conclusion. Regardless, this extremely minimal evidence is insufficient to show that Drew was responsible for Kelley's hostile work environment or that she exercised supervisory authority over Kelley such that she would be on notice and obligated to correct the violations.

Defendant Williams (Kelley Aff., at 13); Williams told Kelley that they could not recommend to Jones a white candidate for the position of Deputy Director of Recreation because Jones would not accept a white candidate (Pl. SMF, at 110); Stogner "probably" discussed the transfers with Williams, but does not recall a specific conversation, before drafting the order reorganizing the Parks Department (Stogner Dep., at 35-37); Williams was copied on Drew's memorandum that resulted in Bryant's demotion (Drew Mem., attached to Ex. to Pl. SMF as Ex. 17); Williams was aware that Bryant was the only supervisor moved out of the department's office in Decatur; Bryant complained to Williams about Drew's racial discrimination (Bryant Aff., at ¶ 19); After Drew was hired, Jones and Williams would bypass Kelley and go directly to Drew with issues involving the Parks Department (II Pl. SMF, at 42); Williams is Drew's supervisor, has direct supervisory authority over the Parks Department, and was in charge of reorganizing the department pursuant to Jones's February 12, 2002 order.

Plaintiffs' evidence is sufficient for a reasonable jury to find that Williams, as Assistant County Administrator with direct supervisory authority over Drew and the Parks Department, was aware of the specific actions Drew directed at Bryant and Drake, supported Jones's plan to increase black personnel and to decrease white personnel, and that he did not prevent Drew from discriminating against Bryant and Drake. Williams also would have had direct

supervisory authority over Kelley when she was Director of the Parks Department, and Plaintiffs also submit evidence, though it is contradicted by Defendants, that when Kelley worked in the Greenspace group, Williams was in charge of the development portion of the program. (Kelley Aff., at ¶ 24.) Taking the facts in the light most favorable to Plaintiffs, the Court cannot conclude as a matter of law that there was not a causal connection between Williams and the alleged hostile work environment experienced by Kelley, Drake and Bryant, and Williams's motion for summary judgment on Kelley, Bryant and Drake's hostile work environment claim is denied.

Stogner's Involvement in the Hostile Work Environment Claims

Defendant Stogner argues that Plaintiffs cannot show that he personally participated in creating the hostile work environment alleged by Kelley, Bryant and Drake or that there is a causal connection between his actions and the violation alleged. Bryant and Drake refer to two facts as evidence of Stogner's involvement in their hostile work environment claim. First, that Stogner told Drake that Jones had made "too many political commitments" to consider Drake for Director of the Parks Department, and second, that Drake would be transferred to the Parks Department to "prop up Drew." (Pl. SMF, at 163, 165.) These statements alone are insufficient to show that

Stogner directly participated in the alleged harassment suffered by Bryant and Drake.

Taking the facts in the light most favorable to Kelley, she refers to the following acts by Stogner as contributing to her hostile work environment: Stogner told Kelley that Jones wanted to showcase black parks and black employees; Stogner consistently disregarded her ideas regarding implementation of the Greenspace program and kept her from participating in a meaningful way; Stogner told Kelley that she did not know how to relate to "powerful black men;" Stogner told Kelley she could move her office to Arabia Mountain and allowed her to buy supplies and prepare to move there, then told her at the last minute that she could not in order to frustrate her.

The record evidence is that Stogner is Jones's Executive Assistant, and that Defendant Williams, who is an Assistant County Administrator with direct supervisory authority over the Parks and Recreation Department, reports to Stogner. Although Stogner's exact relationship or authority over Williams is unclear, that Williams reports to Stogner, indicates that Stogner has some degree of formal or practical supervisory authority over Williams and the Parks Department. While the connection is weak, the record evidence is sufficient to indicate that Stogner is in a supervisory position over Williams, Drew, and the Parks Department generally, and that he was on notice, and in fact supported, the discriminatory acts and failed to prevent them. After Kelley was

transferred to the Greenspace group, she reported to Stogner through Tina Arbes, and Kelley interacted with Stogner in her job with the Greenspace group. The record is further that Stogner was aware of a plan to decrease white managers and increase black managers in the county. The Court cannot conclude as a matter of law that there is a legally insufficient causal connection between Stogner and the hostile work environment alleged by Kelley, Bryant and Drake. Stogner's motion for summary judgment on the hostile work environment claims is therefore denied.

Stone's Involvement in Bryant and Drake's Hostile Work Environment

Stone also argues that Kelley, Bryant and Drake have not put forth evidence that Stone personally participated in creating or maintaining an alleged racially hostile work environment for Bryant or Drake, or had a causal connection with it sufficient to hold him liable for the violation alleged. First, in her deposition, Kelley stated that she is not asserting a hostile work environment claim against Stone, therefore no hostile work environment claim may be asserted against him.[29] (Kelley Dep., at 25.)

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[29] This does not stop Plaintiffs from making the same general, blanket argument in their Response to Stone's motion for summary judgment that they use for all Defendants that Stone should be held liable for Kelley's alleged hostile work environment. Plaintiffs challenge Stone's motion for summary

(Continued on following page)

Plaintiffs offer minimal evidence of Defendant Stone's involvement in creating the hostile work environments alleged by Bryant and Drake. Regarding Stone's actions towards Bryant, Lowe testified that Stone told him specifically not to have Drake and Bryant publicly visible in the Parks Department. (Lowe Aff., at ¶ 13.) Plaintiffs also assert that Stone contributed to Bryant's hostile work environment because the Department of Human Resources, of which he was the director, approved and processed Billups' transfer from Deputy Director of Strategic Management and Development, which Billups shared with Lowe, to Deputy Director of Recreation Services. (II Pl. SMF, at ¶ 65.) In so doing, Plaintiffs claim that Stone allowed Billups to assume the title of the position that Bryant was supposed to be performing. (*Id.*) Plaintiffs also allege that Stone took nine months to complete Bryant's EEO Complaint against Drew, and that Stone never informed Bryant the investigation was complete or apprised him of his findings. Plaintiffs assert that Stone "allowed and approved" Drew's hiring as a deputy director at a

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judgment claim without even responding to Stone's argument on this issue. Plaintiffs simply reiterate their general argument that each defendant participated in all the claims asserted by Plaintiffs, including Kelley's hostile work environment claim. Stone's argument that Plaintiffs failed to properly oppose summary judgment pursuant to L.R. 56.1 is well-taken. (Reply to Pl. Resp. to Stone MSJ, at 2.) Plaintiffs' often undisciplined and inexact briefing has frustrated the consideration of the motions before the Court. The Court encourages Plaintiffs to aspire to a higher standard for their work product.

higher salary than Bryant, even though the evidence is that Stogner told Kelley to offer Drew a higher salary. (*Id.*; Ex. J, at 61.) Essentially, Plaintiffs claim that because Stone was aware of and contributed to the overall scheme to discriminate against white employees, actions by other Defendants can be attributed to him, even when there is no evidence linking him to the action. (II Pl. SMF, at 83.) The Court disagrees. There is simply an insufficient link between Stone and the alleged hostile work environment suffered by Bryant and Drake, and the evidence does not show Stone personally participated in the acts alleged by Plaintiffs.

There also is no evidence that Stone was Kelley, Bryant or Drake's supervisor or that he had responsibility for their work assignments or work environment sufficient to impose supervisory liability on him.[30] (Def. SMF, at ¶ 114.) Based on the undisputed material facts alleged with respect to Stone, the Court finds as a matter of law that Stone is entitled to summary judgment on Kelley, Bryant and Drake's hostile work environment claim.

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[30] Although Plaintiffs do offer evidence that Stone was aware of Jones's agenda, and Lowe testified that Drew told him that Stone was helping the plan be executed, this evidence alone is insufficient to establish a causal connection between Stone and the hostile work environment claims asserted by Plaintiffs.

5. *Plaintiff Kelley's Claim for Constructive Discharge*

"[C]onstructive discharge occurs for the purpose of employment discrimination when the employer, rather than directly discharging the employee, creates an intolerable work atmosphere that forces the employee to quit involuntarily." *Johnson v. Woodruff,* 28 F. Supp. 2d 1248, 1250 (M.D. Fla. 1998) (citing *Chertkova v. Conn. Gen. Life Ins. Co.,* 92 F.3d 81 (2nd Cir. 1996)). A plaintiff "must show the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign." *Virgo v. Riviera Beach Assoc., Ltd.,* 30 F.3d 1350, 1363 (11th Cir. 1994); *see also Kilgore v. Thompson & Brock Mgmt., Inc.,* 93 F.3d 752, 754 (11th Cir. 1996); *Poole v. Country Club of Columbus, Inc.,* 129 F.3d 551, 553 (11th Cir. 1997). "[F]or a constructive discharge claim to present a jury issue and thereby survive summary judgment, the plaintiff must produce substantial evidence that conditions were intolerable." *Akins v. Fulton County,* 420 F.3d 1293, 1302 (11th Cir. 2005). A prima facie case of constructive discharge is established if one may reasonably infer discrimination from the unrebutted facts. *Castle v. Sangamo Weston, Inc.,* 837 F.2d 1550, 1559 (11th Cir. 1988).

"An employer may defend against [a constructive discharge claim] by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of [discrimination], and (2) that the plaintiff unreasonably failed to avail

herself of that employer-provided preventive or remedial apparatus." *Pa. State Police v. Suders,* 542 U.S. 129, 134, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004). This defense is unavailable, however, "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." *Id.* Kelley has put forth evidence of a humiliating demotion in this case, therefore Defendants may not assert this defense.

Taking the facts in the light most favorable to Plaintiffs, Kelley offers the following evidence to support her constructive discharge claim: Defendant Jones angrily confronted her on several occasions, and on one occasion, Jones yelled and screamed at her and approached her in a physically threatening manner. (Pl. SMF, at ¶ 102.) Jones told Kelley not to speak to the press as Parks Department Director or speak with members of the Board of Commissioners, though her previous job duties included these tasks. (Pl. SMF, at ¶¶ 103-104.) Stogner told Kelly that she didn't understand the geopolitical issues of DeKalb County and that she could not relate to powerful black men. (Pl. SMF, at ¶ 105.) Stogner also told Kelley that Jones wanted to showcase black parks and black employees, implying that Jones did not want white employees, including her, to represent the Parks Department. (*Id.* at ¶ 116.)

The evidence is further that after Jones was elected, Kelley's hiring authority was drastically reduced. Specifically, Kelley was not permitted to make hiring decisions or to conduct applicant interviews on her own. Williams was required to interview candidates with Kelley. Williams told Kelley that a white candidate could not be recommended for the position of Deputy Director of Recreation because Jones would not accept it. (Pl. SMF, at 110.) After Drew was hired to fill the Deputy Director position, Jones and Williams isolated Kelley by bypassing her in the decision-making process and by communicating directly with Drew. (Pl. SMF, at ¶ 114.) Kelley was demoted from her position as Director of the Parks Department and reassigned to the Greenspace group where she was to work in a group. She was denied an official title and was not given supervisory authority, (*id.* at ¶ 121), and she was ordered to report to Tina Arbes, rather than directly to Stogner as she had done before. (*Id.* at ¶ 122.) Kelley's proposals for the Greenspace bond program were repeatedly rebuffed by Stogner and her supervisor, Tina Arbes, even though she was the only person in the group who had bond issuance experience, and she was prevented from making contributions to the group. Kelley was designated to be moved from her former Director's office into a small, windowless office that used to be a storage area. (Pl. SMF, at ¶ 131.) Stogner intentionally induced Plaintiff to spend needless time and money moving offices, then withdrew approval for her to do so. Kelley's transfer to the Greenspace group was

considered by her to be personally and professionally humiliating, and it was uniformity [sic] perceived as a demotion. (*Id.* at ¶ 127, 129, 132.)

Kelley submits evidence that when she finally left her employment with DeKalb County, she had no meaningful job responsibilities and her duties had been reduced to spending most of her time "coloring maps." (*Id.* at 133.) Kelley testified that she was "taken from a position of great stature and prominence and placed into a highly subordinate role where [she] moved from personally managing a $10 to 20 million bond budget to having no financial oversight, from [having responsibility for over 600 positions] to having quasi oversight over three people." (Kelley Dep., at 121.) Kelley claims these circumstances and this treatment of her constitute her constructive discharge.

Defendants rely on a variety of cases to support their contention that Kelley had not suffered a constructive discharge. These cases are distinguishable. In *Fitz v. Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974, 978 (11th Cir. 2003), the plaintiff asserted a constructive discharge claim based on a withdrawn reprimand; statements of supervisors that plaintiff would be fired due to his race that were not supposed to be revealed to the plaintiff; offensive cartoons that were not condoned by his supervisor; a job offer to transfer to another managerial role after plaintiff complained of discrimination; and a claim of unequal pay. Under these conditions, the Eleventh Circuit held that plaintiff's work situation was not so

intolerable that the plaintiff was forced to quit involuntarily; therefore the constructive discharge claim failed. Here, Kelley claims significant adverse effects, none of which were withdrawn or undone.

In *Tatroe v. Cobb County,* the plaintiff sued her employer and supervisors under § 1983 for retaliation against her for exercising her First Amendment rights. No. 1:04-CV-1074-WSD, 2006 WL 559437, 2006 U.S. Dist. LEXIS 66462 (N.D. Ga. Mar. 7, 2006). This Court found that no constructive discharge had occurred, because "Plaintiff did not offer evidence that she was stripped of her work duties or benefits, subjected to humiliating or unfairly physically challenging work conditions." *Id.*, 2006 WL 559437, *9, 2006 U.S. Dist. LEXIS 66462 at *27. In *Tatroe*, the plaintiff's allegations essentially consisted of a claim that her job performance was closely scrutinized and that this scrutiny led to several written reprimands and other unfair personnel actions which did not change her job title or responsibilities. This Court held that, "Plaintiff's subjective frustration with what she perceived as an inability to advance within the Bureau is not sufficient to demonstrate that her working conditions were so intolerable that a reasonable person would feel compelled to resign rather than continue employment." *Id.*, 2006 WL 559437, **9-10, 2006 U.S. Dist. LEXIS 66462, at *27-28. In contrast, Kelley asserts that she was indeed stripped of her work duties, suffered a demotion and reduction in prestige of her position, and was almost made to work in what appears to be at least an inferior, and at most degrading, office space.

The facts here more closely resemble in quality the treatment of the plaintiff in *Poole,* where Plaintiff's constructive discharge claim survived summary judgment. In *Poole,* the plaintiff asserted a claim of constructive discharge against the defendant country club and its general manager, for whom she worked as an executive secretary. She asserted that her job duties and responsibilities were reduced to virtually nothing and she was relieved of all existing responsibilities, although her pay and benefits were not affected. *Poole,* 129 F.3d at 552. In *Poole,* the defendant manager gradually removed the plaintiff's job duties and assigned them to his wife. Later, the manager refused to submit plaintiff's worker's compensation claim to the defendant's insurance carrier and also made remarks about the plaintiff's age. Eventually, the plaintiff was not allowed to use her desk or computer and was assigned to the business office to stuff envelopes. The defendant eventually told the plaintiff that she was being relieved of all her responsibilities and transferred her to the business office, although her pay and benefits would be maintained at the levels that were then in place. Plaintiff alleged that her coworkers were instructed by the defendant manager not to speak to her, that once in the business office she was given only a chair with no desk, and that, because she had no place to store her belongings, they were placed next to her chair in boxes. The Plaintiff resigned. The Eleventh Circuit held that the plaintiff had submitted sufficient evidence for her constructive discharge claim to go to a jury. *Id.*

Although Kelley's evidence relating to her claim for constructive discharge is not as compelling as that of the plaintiff in *Poole,* viewing the evidence in the light most favorable to Kelley, the Court finds she has demonstrated a genuine issue of material fact as to whether Kelley was constructively discharged. *See Wardwell v. Sch. Bd. of Palm Beach County, Fla.*, 786 F.2d 1554, 1557 (11th Cir. 1986) (stating that a discriminatory refusal to promote would be relevant to the issue of whether plaintiff was constructively discharged). That is, the Court is satisfied that Plaintiff's evidence is sufficient to create a jury question as to whether a reasonable person would find the working conditions at issue so intolerable that Plaintiff was compelled to resign. Summary judgment on Kelley's constructive discharge claim is not appropriate.

Individual Defendant Culpability

Several of the Defendants, including Williams and Drew, argue that they were not involved in the acts surrounding Kelley's alleged constructive discharge.[31]

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[31] Additionally, because Kelley testified that she did not assert a hostile work environment claim against Stone, the Court finds that Stone is entitled to summary judgment on Kelley's constructive discharge claim.

Defendants [sic] *Williams's Involvement in the Constructive Discharge*

Williams argues that he was not the decision-maker regarding Kelley's constructive discharge and that he therefore is not liable. The Court has already held that Plaintiffs' evidence is sufficient for a reasonable jury to find that Williams, as Assistant County Administrator with direct supervisory authority over Drew and the Parks Department, was aware of the pervasive hostile work environment that was being instituted, and that he was complicit in the discriminatory scheme to remove white managers from DeKalb County. Plaintiffs have therefore offered sufficient evidence that there is a causal connection between Williams and Kelley's constructive discharge resulting from the discriminatory actions and hostile work environment. Williams's motion for summary judgment on Kelley's constructive discharge claim is therefore denied.[32]

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[32] Williams also appears to argue that Kelley's constructive discharge claim is barred because no acts contributing to the discharge occurred after August 24, 2002. (Williams MSJ, at 20.) This Court finds that the statute of limitations for a constructive discharge claim is measured from the date the employee gives notice of his intent to resign. *See Scott,* 232 F. Supp. 2d at 1295 ("holding that although the Eleventh Circuit has not addressed the issue, the majority of other courts have held that the EEOC's 180-day filing period for a claim of constructive discharge is measured from the date the employee gives notice of his intent to resign, not the last day of employment."); *see also Brewer v. Alabama,* 111 F. Supp. 2d 1197, 1205 (M.D. Ala. 2000).

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Drew's Involvement in the Constructive Discharge

Drew argues there is an insufficient causal connection for her to be held liable for Kelley's constructive discharge claim. The evidence of Drew's involvement in Kelley's constructive discharge claim consists of an incident where Drew attempted, after becoming Director, to have Kelley removed from her office and placed into a much smaller office that formerly was used as a storage area. Plaintiffs' evidence indicates that the decision to transfer Kelley to the Greenspace program was not made by Drew, but was made before Drew became Director of the Parks Department. After Kelley was transferred to the Greenspace program, she reported, through Tina Arbes, to Defendant Stogner and was officially within the office of the CEO. The evidence, therefore, is that Drew did not have supervisory authority over Kelley and was not otherwise sufficiently connected to the acts Kelley alleges contribute to her constructive discharge to hold Drew liable for acts complained of by Kelley. Accordingly, Drew's motion for summary judgment on Kelley's constructive discharge claim is granted.[33]

Williams's motion for summary judgment on Kelley's constructive discharge claim is therefore denied.

[33] Drew also argues that Kelley's constructive discharge claim is time-barred. The Court has ruled that this claim is not time barred, therefore Drew's motion for summary judgment on this ground is denied.

6. *Plaintiff Lowe's Retaliation and First Amendment Claim*

Administrative Hearing Bar

Defendants argue that Plaintiff Lowe is bound by the hearing officer's conclusion upon his appeal of his job abolishment that his position was abolished as part of a reduction in force, and thus Lowe is barred from litigating whether his position was eliminated in retaliation for his objection to the discriminatory practices he alleges. Plaintiffs argue that the Court is not bound by the agency's decision because the issue before the Court was not addressed by the hearing officer. The Court agrees.

Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003), applies. In *Travers,* the plaintiff, a firefighter, had a verbal encounter with the Defendant Jones while plaintiff and a group of firefighters were picketing outside DeKalb County administration building. *Travers,* 323 F.3d at 1295. The DeKalb County fire chief suspended the plaintiff without pay for insubordination and unbecoming conduct. *Id.*

The *Travers* plaintiff appealed his suspension to a merit system hearing officer as allowed by the Code of DeKalb County. The hearing officer found that the facts surrounding the verbal exchange did not indicate any non-job-related factor or any errors of fact that would reverse the plaintiff's suspension. *Id.* at 1296. The plaintiff then filed a complaint in the district court for the Northern District of Georgia, alleging that he was disciplined in retaliation for

engaging in protected union activity and that his First Amendment rights were violated. The district court denied qualified immunity on the basis that there were issues of fact concerning the reasons that the plaintiff was disciplined. On appeal to the Eleventh Circuit, the defendants argued that the district court was bound by the hearing officer's earlier determination that plaintiff's rights were not violated.

In deciding whether the district court was bound by the hearing officer's findings of fact, the Eleventh Circuit held:

> [t]hose findings are binding upon the court in a case such as this one if the employee received a *full and fair opportunity to present his case* in the administrative hearing. When a state agency, acting in a judicial capacity, resolves *disputed issues of fact properly before it* that the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court.

Id. (emphasis added). The Eleventh Circuit concluded in *Travers* that the Plaintiff had received a full and fair opportunity to present his case on the factual dispute that ultimately was at issue in the district court, and because these fact disputes were resolved by the hearing officer, the district court was bound by the resolution reached at the administrative hearing. *Id.* at 1297.

Travers is distinguishable from the case here. The officer who presided over Plaintiff Lowe's hearing did not have the authority to hear evidence or make findings about the cause of Lowe's termination. He determined only that the dismissal was the result of Lowe's position being abolished. The officer made a very narrow finding:

> The undersigned finds, in the instant case, that, in fact, the DeKalb County Board of Commissioners voted not to appropriate funding for the position of Deputy Director, Strategic Management Development, Park[s] and Recreation Department.

Decision of Hearing Officer, attached to Vol. II (Ex. in Support of Def. MSJ as Ex. 26.) The issue before this Court is not identical to the issue resolved by the hearing officer in Lowe's appeal of his job elimination. Here, Plaintiff Lowe alleges a series of discriminatory acts which ultimately resulted in him being maneuvered into a position which Defendants intended to abolish, resulting in Plaintiff Lowe's termination of employment.

Defendants next argue that Lowe's retaliatory discrimination claim is barred because "[c]ollateral estoppel bars not only the relitigation of issues actually litigated and decided by a prior action, it also precludes issues that necessarily had to be decided in order for the previous judgment to have been rendered." *Meagher v. Quick,* 264 Ga. App. 639, 645, 594 S.E.2d 182 (2003). Defendants claim that to conclude that Lowe's position was in fact abolished

due to reduction in force, the Hearing Officer necessarily rejected other bases for Lowe's termination.

Defendants' argument is unconvincing. First, Defendants misconstrue the Hearing Officer's findings. The Hearing Officer simply found that "in fact, the DeKalb County Board of Commissioners voted not to appropriate funding for the position." He did not find that the underlying reason for abolishing the position was a reduction in force, rather than retaliation, and he did not consider whether Plaintiff Lowe wrongfully was maneuvered into a position which was then intentionally abolished. The issue before this Court is different from whether the Board of Commissioners voted not to fund Lowe's job. It is whether Defendants recommended the abolishment of Lowe's job with an impermissible retaliatory motive. Plaintiff Lowe's retaliation claim is not resolved or precluded by the hearing officer's determination.[34]

Legislative Immunity Bar

Jones argues that he is entitled to legislative immunity as to Lowe's retaliatory discharge and First

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[34] Plaintiffs present reasonably convincing evidence that Plaintiff Lowe did not receive a full and fair opportunity at the hearing to litigate his case as required by *Travers*. Plaintiff Lowe testified that Defendant Stone told him that there was no use in appealing his case.

Amendment claims. (Jones MSJ, at 37.) Absolute legislative immunity attaches to all actions taken "in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris,* 523 U.S. 44, 55, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998). "Legislative immunity provides protection from suit to government officials when they take actions that are an integral part of the deliberative and communicative processes by which legislators participate in proceedings with respect to the consideration and passage or rejection of proposed legislation." *Smith v. Lomax,* 45 F.3d 402, 405 (11th Cir. 1995) (quoting *Gravel v. United States,* 408 U.S. 606, 625, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972)). "Only those acts which are 'necessary to preserve the integrity of the legislative process' are protected." *Id.* (citing *Yeldell v. Cooper Green Hosp., Inc.,* 956 F.2d 1056, 1062 (11th Cir. 1992)). The question, therefore, is "whether the defendant in the instant case [was] engaging in legislative activity." *Id.* (citing *Espanola Way Corp. v. Meyerson,* 690 F.2d 827, 829 (11th Cir. 1982)).

Typically, legislators' employment decisions are deemed administrative acts. *Id.* (citing *Yeldell* and holding that voting on the appointment of a board clerk is not the sort of broad "legislative" activity typically associated with absolute immunity). "A legislative act involves policymaking rather than mere administrative application of existing policies." *Id.* at 406 (citing *Minton v. St. Bernard Parish Sch. Bd.,* 803 F.2d 129, 135 (5th Cir. 1986)). "If the facts utilized in making a decision are specific, rather than

general, in nature, then the decision is more likely administrative. Moreover, if the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature." *Id.* Relying on *Bogan,* Jones argues that introducing the budget proposal is a legislative act. Plaintiffs argue that *Bogan* does not apply because *Bogan* involved the introduction of a budget and the adoption of a related ordinance, not the mere submission of a budget proposal. Plaintiffs argue, therefore, that Jones is not entitled to legislative immunity.

In *Bogan,* the plaintiff, a city agency administrator, received a complaint that an employee had made racial and ethnic slurs. *Bogan,* 523 U.S. at 47, 118 S.Ct. 966. The administrator prepared termination charges against the employee, who pressed her case with several state and local officials, including the vice president of the city council. The council held a hearing on the charges and ultimately accepted a settlement proposal which provided for the employee to be suspended without pay for 60 days.[35] While the charges against the discriminating employee were pending, the defendant, mayor of the city of which Plaintiff was the city agency head, prepared his budget proposal for the fiscal year. He proposed freezing the salaries of all municipal employees,

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[35] The mayor of the city subsequently reduced the punishment.

eliminating 135 city positions, and called specifically for the elimination of a department in which the plaintiff was the sole employee. The City Council Ordinance Committee, which was chaired by a defendant, approved an ordinance eliminating the plaintiff's department. The city council adopted the ordinance and the defendant mayor signed it into law. *Id.*

The plaintiff administrator subsequently brought § 1983 claims against the city, the mayor, and the city council member (who chaired the committee which passed the ordinance eliminating Plaintiff's department), alleging that the elimination of her department was calculated to terminate her and that the elimination was racially motivated and in retaliation against the plaintiff for exercising her First Amendment rights. The Supreme Court held that "[Mayor] Bogan's introduction of a budget and signing into law an ordinance . . . were formally legislative, even though he was an executive official. We have recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions; [the mayor's] actions were legislative because they were integral steps in the legislative process." *Id.* at 55, 118 S.Ct. 966. The Court noted: "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Id.* at 53, 118 S.Ct. 966. The Court held that the "motive or intent" of the defendant is irrelevant in determining whether absolute immunity applies. *Id.* at 54, 118 S.Ct. 966.

The facts here are similar to those in *Bogan*. Jones approved of and submitted the 2004 budget recommendation to the DeKalb County Board of Commissioners. On January 27, 2004, the Board voted to adopt the 2004 budget. The Court finds that Jones's submission of the 2004 budget to the Board of Commissioners was legislative in nature, and Jones is entitled to legislative immunity for this activity. Jones's motion for summary judgment on Plaintiff Lowe's termination claims therefore is granted.

Defendant Stogner argues that he also is entitled to absolute legislative immunity. (Stogner MSJ, at 37.) Stogner argues he is entitled to legislative immunity under *Bogan* because drafting the budget also is a legislative function. (*Id.*) He argues further that presenting a budget to a legislative body is a legislative act, even if performed by an executive official. The argument is unconvincing. Stogner is an unelected employee who serves as an Executive Assistant to a county chief executive officer. The Supreme Court has held that the "doctrine [of legislative immunity] is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." *Dombrowski v. Eastland,* 387 U.S. 82, 84, 87 S. Ct. 1425, 18 L. Ed. 2d 577 (1967). Stogner is not an officer or employee of a legislative body – he is an executive assistant of someone who is serving in an executive position. Stogner's activities included providing input into the decision to eliminate Lowe's position and the drafting of the budget proposal

which reflected the elimination. He did not decide the final budget to be submitted, did not introduce the final version of the budget for approval by the Board, nor did he take any other act that could be deemed legislative. Stogner is not entitled to legislative immunity, and Stogner's motion for summary judgment on this grounds [sic] is denied.

Lowe's Racial Retaliation Claim

Having considered the affirmative defenses to Lowe's retaliation claim, the Court next considers Defendants' argument that Lowe has not shown sufficient disputed facts that the elimination of Lowe's position constituted wrongful retaliation.[36] Defendants argue specifically that Lowe's claim for retaliation fails because even if Lowe could establish a prima facie case of retaliation, he cannot rebut Defendants' legitimate, non-discriminatory reasons for recommending abolishing Lowe's position.[37]

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[36] The Court has found that to the extent Lowe asserts a claim for discriminatory transfer, this claim fails because Lowe requested to be moved from the Parks Department. Likewise, the Court also found that any claim for retaliation based on failure to provide a performance review fails because Plaintiffs did not adequately respond to Defendants [sic] argument and offer sufficient evidence from which to show such a violation occurred.

[37] To establish a prima facie case of retaliation, Plaintiff must demonstrate that: 1) he engaged in statutorily protected activity; 2) he suffered an adverse employment action; and 3) a causal relation between the two. *Raney v. Vinson Guard Serv.*, 120 F.3d 1192, 1196 (11th Cir. 1997).

Defendants do not contest, for purposes of their summary judgment motions, that Lowe has asserted a prima facie case of retaliation.[38] Thus, assuming a prima facie case has been shown, the burden of production shifts to the Defendant to rebut the inference of discriminatory retaliation by articulating a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Defendants offered evidence that Stogner drafted the budget abolishing Lowe's position after discussing the issue with Drew and Ann Kimbrough, Jones's assistant, and that Drew and Kimbrough advised him that Lowe's position was not needed, and the duties performed in the position were being performed by other employees. (Def. SMF, at ¶ 143.) This is a legitimate, non-discriminatory reason for Defendants' adverse employment actions, therefore the Plaintiffs must show that Defendants' reason for termination was a mere pretext for discrimination.

"To survive summary judgment, the plaintiff must . . . present concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext. Mere conclusory

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[38] In his Reply brief, Jones appears to argue for the first time that Lowe's claim for retaliatory termination fails because he cannot show the necessary sufficient causal connection. "Defendants, however, may not make new arguments in the reply brief." *Adams v. Cobb Cty. Sch. Dist.,* No. 1:03-cv-2464-RLV-ECS, 2006 LEXIS 63767, at *28 (N.D. Ga. July 6, 2006).

allegations and assertions will not suffice." *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). To establish pretext, "the district court must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)).

A complicated assignment process suggests this pretext. Lowe originally was hired as Deputy Director of Strategic Management and Development for the Parks Department. Shortly after he was hired and thereafter, Lowe was told that there was a plan to discriminate against white managers, that there are ways to get rid of employees without firing them, and that he should "dig up dirt" on white managers. Lowe stated he informed Stone, Drew, Jones and Williams separately that he would not participate in a scheme to discriminate against white managers in the department, and when he resisted he was admonished for not being a team player.

Being in the middle of conduct he did not condone, Lowe demanded to be reassigned so that he no longer worked for the Department. His demand was met when in May 2003, he was moved into Jones' executive office. Lowe kept his Deputy Director position and job responsibilities, although he also was

asked to work on special projects. After moving Lowe to the sixth floor closer to him,[39] Jones again told Lowe that if he wanted to continue working for DeKalb County, he would have to be a team player. Two months later, on July 23, 2003, Marvin Billups, a black male, was hired and given the job of Deputy Director of Strategic Management and Development – the same title as Lowe. His position was time-limited until December 2003. Billups's duties were those that had been performed by Lowe.

Before December, Billups's title was changed to Deputy Director of Recreation. His duties, however, did not change. After Billups's title was changed to Deputy Director of Recreation, Lowe was left as the only person with the title of Deputy Director of Strategic Management and Development. That position was then abolished when Jones submitted the 2004 budget, and with that action, Lowe was terminated. Lowe argues these actions were taken by Defendants to eliminate his position in retaliation for opposing Defendants' discriminatory practices and was a subterfuge to disguise his retaliatory discharge. Defendants deny this claim, argue this was a legitimate reorganization of duties, and specifically deny any statements attributed to them to the effect that Lowe was enlisted to assist in an effort to eliminate white managers. There is a clear and

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[39] This move, a reasonable person may conclude, was to enable senior officials to help keep close tabs on someone who was not a team player.

important dispute of material facts regarding whether the events surrounding the elimination of Lowe's position constitute actionable discrimination, and summary judgment on this retaliation claim is denied.[40]

Lowe's First Amendment § 1983 Retaliation Claim

To sustain a claim of retaliation for protected speech, a public employee must prove each of the following: (1) his speech was on a matter of public concern; (2) his interest in engaging in the speech outweighs the county's interest in prohibiting the speech; and (3) his speech played a substantial part in the county's decision to transfer him or abolish his position. *Anderson v. Burke Cty.*, 239 F.3d 1216, 1219 (11th Cir. 2001). "A public employee's speech is generally not protected if it is made not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."

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[40] Drew makes the same arguments regarding Lowe's claim for retaliation based on his transfer to the sixth floor and failure to receive performance reviews. (Drew MSJ, at 35.) The Court already held that both these claims fail. Defendants also argue, citing *Little v. United Tech.*, 103 F.3d 956 (11th Cir. Jan [sic] 22, 1997), that Lowe may not assert a claim for retaliation under § 1981 because he does not allege he was discriminated against because of his race. The Eleventh Circuit, however, decided in *Jackson v. Motel 6 Multipurpose, Inc.*, that such a claim may be asserted, and Defendants drop this argument in their Reply briefs. 130 F.3d 999, 1007 (11th Cir. Dec. 10, 1997) ("The . . . plaintiffs' claim for retaliation may, however, proceed under section 1981(b).").

Berry v. Coleman, 172 Fed. Appx. 929, 931 (11th Cir. 2006).

To assert a claim for First Amendment retaliation, a plaintiff must show his speech may be fairly characterized as constituting speech on a matter of public concern. *See Morgan v. Ford,* 6 F.3d 750, 754 (11th Cir. 1993). The "public concern" element is a question of law to be determined by the court. *Deremo v. Watkins,* 939 F.2d 908, 910 (11th Cir. 1991). In making this determination, the court must consider the content of the speech, as well as its form and context. *Connick v. Myers,* 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

With respect to complaints by public employees concerning alleged invidious discrimination in the workplace, the Eleventh Circuit has declined to adopt *per se* rules regarding what is and is not speech on a matter of public concern, instead requiring district courts to examine the particular speech at issue. *See Morgan,* 6 F.3d at 755 (holding public employee's complaints about alleged sexual harassment and filing of a charge of discrimination with the Georgia Office of Fair Employment Practices did not constitute speech which could be fairly characterized as speech on a matter of public concern); *Belyeu v. Coosa County Bd. of Ed.,* 998 F.2d 925, 928 (11th Cir. 1993) (affirming district court's holding that public employee's speech at a school board meeting concerning the school's treatment of Black History Month implicated public concerns).

The Supreme Court recently explained, in *Garcetti v. Ceballos,* the policy considerations behind the "public concern" requirement:

> The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. Underlying our cases has been the premise

> that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance."

Garcetti v. Ceballos, ___ U.S. ___, at ___-___, 126 S. Ct. 1951, at 1957-58, 164 L. Ed. 2d 689 (2006) (citations and quotations omitted).

Lowe claims his discharge for opposing racial discrimination violated his First Amendment rights, and the discharge is actionable under § 1983. To determine whether Lowe was speaking on a matter of public concern – and thus engaging in protected speech – the Court considers the "content, form, and context of a given statement, as revealed by the whole record." *Kendall v. Cobb County*, 14 F. Supp. 2d 1342, 1348 (N.D. Ga. 1998) (citing *Connick*, 461 U.S. at 146-48, 103 S.Ct. 1684). This evaluation shows that Lowe's speech was not protected. The content of the speech reflects that Lowe was not speaking as a citizen.[41]

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[41] Lowe testified that he told Defendants (except for Stogner): "Look, it's fine if that's your agenda; I just don't want to be a part of it; I just don't." (Lowe Dep., at 397.) Lowe's comment reflects only his refusal to participate in their agenda to discriminate, not any disapproval of Defendants' actions or concern for preventing the discrimination. He also testified that he told three acquaintances of the discrimination, but provided no detail regarding those discussions. (Lowe Dep., at 192.) Lowe mentioned a memo to Stogner discussing unethical practices, but he admitted that it was not in regard to the alleged discrimination.

The context of Lowe's speech also supports the conclusion that it did not concern a public matter. Although racial discrimination is an issue in which the public has an interest, unlike the plaintiff in *Kendall,* Lowe did not speak with co-workers in any detail about his concern, he did not report the alleged discriminatory conduct to his superiors, and he did not warn any white managers, specifically the other plaintiffs in this case, that he was concerned about the existence of discrimination. That is, his speech was not "public," and although a "public employee does not forfeit his protection against governmental abridgment of freedom of speech if he decides to express views privately rather than publicly," the evidence does not demonstrate that Lowe made this statement as a citizen airing public concerns, and the statement did not have this effect.

In fact, Lowe only made his statements in response to comments regarding, or solicitations from Defendants inviting him to join in, discriminatory conduct or to support their agenda to eliminate white managers. These comments were made in private conversations, Lowe made no attempt to air his comments publicly out of a sense of concern for the public harm, and he did not attempt to dissuade Defendants from their plan. *See Berry,* 172 Fed. Appx. at 932 (holding that a memo written by employee within context of his employment, provided only to his supervisor, where employee did not take affirmative steps to communicate to the public and where the employee was attempting to ensure his

conduct was legal, were of a personal, not public, concern).[42] Lowe's comments, therefore, do not constitute speech on a matter of public concern, and summary judgment on Plaintiff Lowe's First Amendment claim is granted.

Individual Defendants' Involvement in Alleged Retaliation

Defendant Stone argues that he was not involved in the conduct resulting in Lowe's termination. In response, Plaintiffs offer the following evidence: Defendants Jones, Stone, Williams and Drew each were involved in the conduct to discriminate and asked him to help implement the plan. (II Pl. SMF, at ¶ 125.) Lowe claims that Stone stated that he wanted to have a "darker administration" to reflect "the new DeKalb County." (*Id.* at ¶ 126.) Lowe also testified that he told Stone, Jones, Williams and Drew that he would not participate in the scheme. (*Id.* at ¶ 129.) Plaintiffs claim that Stone was involved "in some capacity" in Lowe's move to the sixth floor because human resources generated the personnel action and requisition forms that allowed Billups to double-fill

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[42] The interests protected by the First Amendment discussed by the Supreme Court in *Garcetti* are not furthered here. The First Amendment protects the public's interest in receiving the well-informed views of government employees engaging in civic discussion and allowing well-informed public employees to participate in public debate. Plaintiff Lowe's comment only to Defendants does not serve these goals.

Lowe's position. (II Pl. SMF, at ¶ 136.) Plaintiffs claim that Stone, Drew and Williams were involved in the decision to abolish Lowe's job, although Stogner's testimony was that Stogner abolished the position based on input from only Drew and Ms. Kimbrough. (*See* II Pl. SMF, at ¶ 150; Stogner Dep., at 113.) Plaintiffs claim that Stone, as Director of Human Resources, "would have had to have decided where to transfer Mr. Billups before the position could be eliminated. Human Resources supplied the paperwork for the transfer. . . ." (II Pl. SMF, at ¶ 150.)

Plaintiffs' evidence is simply not sufficient to show Stone's involvement in the abolishment of Lowe's position. Plaintiffs rely on weak inferences that Stone was involved with these decisions solely because he was Director of Human Resources. Stogner testified that he made the decision with the input of Drew and Kimbrough – not Stone. Plaintiffs do not offer evidence to refute this or to connect Stone with the decisions.[43] Stone's motion for summary

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[43] Stone also argues that the tape recording of a conversation between Stone and Williams discussing promotions for Battalion Chief in the Fire Department do not bear on any issue in this case. (Stone MSJ, at 17.) While it is not necessary to decide what role, if any, the tape might play in the further litigation of this matter, the Court does not believe that the recording is evidence of any direct involvement by Stone in the employment decisions in this case sufficient to hold Stone liable for Plaintiffs' claims.

judgment on Lowe's retaliatory termination claim is granted.[44]

Williams argues that he was not the decisionmaker regarding Lowe's termination, and therefore he cannot be held liable for the action. (Williams MSJ, at 16.) The evidence of Williams's involvement with Lowe's termination consists of the following facts: Lowe testified that Williams had spoken to him about the retaliatory scheme, that Lowe told Williams that he would not be involved with the discriminatory scheme, and Williams told him he was not being a "team player." (II Pl. SMF, at ¶ 129.) Williams was responsible for the reorganization of the Parks Department pursuant to Jones's February 2002 order, therefore he would have had to have had input into the decision or approved the abolishment of the position. (II Pl. SMF, at 150.)

First, Lowe's testimony indicates that Williams did not take part in the decision to transfer Lowe to the sixth floor. (Lowe Dep., at 394.) Second, Stogner testified that he made the decision to abolish Lowe's position with input from Drew – not Williams. Third, Williams testified that he did not know that Lowe's position had not been funded until after the budget

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[44] Stogner also argues that Lowe has not put forth evidence that Stogner participated in the decision to assign him to the CEO's office, and therefore argues Lowe's claim for retaliatory transfer fails as against him. (Stogner MSJ, at 20.) The Court has concluded that Lowe's transfer to the sixth floor is not an actionable adverse action.

was finalized and sent to the Board. (Williams Aff., attached to Decl. in Support of Def. MSJ as Ex. C, at ¶ 12.) Although evidence exists that Williams was aware of and did generally participate in the alleged scheme to rid white managers from DeKalb County and did nothing to prevent such discrimination, the evidence does not show that Williams was similarly aware of any retaliatory acts taken against Lowe. Though Williams had supervisory authority over the Parks Department, there is insufficient evidence that he was on notice of a widespread practice of retaliation, and he apparently was not consulted by Stogner, who drafted the budget. The evidence appears to indicate that this decision was made at a level higher than Williams. There is insufficient evidence of Williams' involvement in the alleged retaliatory termination of Lowe, and the Court finds that Williams's motion for summary judgment as to Lowe's retaliatory discharge claim should be granted.

Drew also argues that there is not sufficient evidence to hold her liable for Lowe's claim of retaliation. Considering the facts in the light most favorable to Plaintiffs, Plaintiffs present the following evidence of Drew's involvement in the alleged retaliation: Drew interviewed and hired Billups as Deputy Director of Strategic Management and Development, thereby double-filling Lowe's position. (Pl. SMF, at ¶ 83.) Stogner testified he based his decision to abolish Lowe's position on information

gained after discussing the matter and receiving input from Drew.[45] (Stogner Dep., at 111.) There is also significant evidence of Drew's involvement in implementing the plan to eliminate white managers. Plaintiffs' evidence is sufficient to create a genuine issue of material fact as to whether Drew was involved in the elimination of Lowe's position, and Drew's motion for summary judgment on this claim is denied.

7. *Qualified Immunity*

Defendants next argue they are entitled to summary judgment on all Plaintiff's [sic] claims against them because they are entitled to qualified immunity. "Qualified immunity offers complete protection for government officials sued in their

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[45] Drew argues that Plaintiffs have not produced evidence that she had the power to eliminate Lowe's position and that Lowe merely speculates that Drew's input with Stogner makes her liable. (Reply to Pl. Resp. to Drew MSJ, at 4-5.) Stogner, however, clearly testified that he made the decision to abolish Lowe's job based on input from Drew, and that he was told by Drew that Lowe was not needed in the Parks Department. (Stogner Dep., 111-113.) "[A] discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge." *Stimpson v. City of Tuscaloosa,* 186 F.3d 1328, 1331 (11th Cir. 1999). Stogner's testimony indicates that his decision to abolish Lowe's position was made in reliance on Drew's input, and Plaintiffs submit sufficient evidence at this stage to show that Drew's input was a direct cause of Lowe's termination.

individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wood v. Kesler,* 323 F.3d 872, 877 (11th Cir. 2003) (citations and quotations omitted). The process for analyzing a defense of qualified immunity is well established:

> To be eligible for qualified immunity, the official must first establish that he was performing a "discretionary function" at the time the alleged violation of federal law occurred. Once the official has established that he was engaged in a discretionary function, the plaintiff bears the burden of demonstrating that the official is not entitled to qualified immunity. In order to demonstrate that the official is not entitled to qualified immunity, the plaintiff must show two things: (1) that the defendant has committed a constitutional violation and (2) that the constitutional right the defendant violated was "clearly established" at the time he did it.

Crosby v. Monroe County, 394 F.3d 1328, 1332 (11th Cir. 2004).

"A right is clearly established if, in light of preexisting law, the unlawfulness of the official's conduct is apparent." *Cooper v. Dillon,* 403 F.3d 1208, 1220 (11th Cir. 2005). This standard does not require that the specific conduct in question was previously found to be unlawful; the state of the law need only give an official "fair warning" that his conduct is unlawful. *Id.* (citing *Hope v. Pelzer,* 536 U.S. 730, 741,

122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). Qualified immunity therefore "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id.* "[T]he relevant question on a motion for summary judgment based on a defense of qualified immunity is whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1503 (11th Cir. 1990).

It is undisputed that Defendants were performing discretionary functions in making the various employment decisions complained of by Plaintiffs.[46] Plaintiffs, then, have the burden of showing Defendants are not entitled to qualified immunity. Plaintiffs have presented sufficient evidence to show that the discriminatory acts complained of here would constitute violation of Plaintiffs' constitutional rights. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted." *Hyath*, 2006 WL 825779, *16, 2006 U.S.

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[46] An official performs a discretionary function when his acts "but for the alleged constitutional infirmity, would have fallen with his legitimate job description," and the acts were done "through means that were within his power to utilize." *Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004). It is clear that Defendants' alleged acts were discretionary because they included making various employment decisions.

Dist. LEXIS, at *49. "[T]his question boils down to whether the state of the law, at the time of the incident, gave 'fair warning' to the official that his conduct was unlawful." *Id.* 2006 WL 825779, **16-17, 2006 U.S. Dist. LEXIS, at *49-50 (noting that the Eleventh Circuit identified three ways to show fair warning: 1) a federal statute that is so specific as to clearly prohibit the conduct, 2) case law categorically prohibiting the conduct, and 3) a case prohibiting the described conduct, involving facts that are not fairly distinguishable from the facts in plaintiff's case).

It is "patently obvious" that intentional, race-based discrimination in public employment is prohibited.[47] *Smith*, 45 F.3d at 407 ("We need not engage in a lengthy discussion of the patently obvious illegality of racial discrimination in public employment, . . . [i]t can hardly be argued that in 1989,

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[47] Several defendants also argue that they are entitled to qualified immunity on Lowe's retaliation claim because at the time of the alleged discrimination, the law did not clearly establish that their activities violated § 1981. This argument is specious. The question is not whether Defendants had fair notice that his [sic] conduct violated § 1981 – the particular statute through which Plaintiffs bring their claims in this instance. The relevant question is whether a reasonable official could have believed his actions were lawful in light of clearly established law. In 2003, Title VII made it facially clear that retaliation for opposing discriminatory employment practices was illegal. 42 U.S.C.S. § 2000e-3. It is irrelevant that Plaintiffs chose to bring their claims under § 1983 for a violation of § 1981 rather than under Title VII. A reasonable official should have known that the alleged retaliation was unlawful at the time.

when the events leading up to this lawsuit [took] place intentional race discrimination in the workplace did not violate the Fourteenth Amendment."). "Whether harassment is sufficiently severe and pervasive to violate the Equal Protection Clause can only be determined after examining the specific facts of the situation." *Id.*, 2006 WL 825779, *17, 2006 U.S. Dist. LEXIS, at *50.

Plaintiffs have put forth sufficient evidence that the hostile work environment and constructive discharge alleged by Bryant, Drake, and Kelley and the retaliation alleged by Lowe violated rights which were clearly established during the relevant time periods. At the time of the alleged violations, it was clearly established that race-based employment decisions are unlawful. The Eleventh Circuit recently affirmed a district court's denial of qualified immunity in a similar racial discrimination case, holding that "the district court observed correctly that the right to be free from racial discrimination in the public workplace was a clearly established constitutional right of which a reasonable official would have known." *McMillan,* 2006 WL 3204829, **2-3, 2006 U.S. App. LEXIS at *6-7; *see also Alexander v. Fulton County, Ga.,* 207 F.3d 1303, 1321 (11th Cir. 2000) (denying qualified immunity and holding that a reasonable jury could find the defendant sheriff intentionally made race-based employment decisions with respect to discipline, promotions, transfers, reclassifications, promotional examinations, restorations of rank, and appointments to unclassified

positions in violation of Plaintiffs' clearly established rights); *Mosley v. MeriStar Management Co., LLC,* 137 Fed. Appx. 248, 252 (11th Cir. 2005) ("Title VII [and] § 1981 . . . provide for causes of action for hostile work environment discrimination based on race."). It was also clearly established, as demonstrated by the facts in *Poole,* that subjecting Plaintiffs to the specific actions alleged here was severe and pervasive racial harassment and is also unlawful, as is retaliating against employees for opposing racial discrimination. *Poole,* 129 F.3d at 552; *Jackson,* 130 F.3d at 1007 (holding, where plaintiff employees alleged they were required to discriminate against minority patrons and were retaliated against for failing to do so, "[t]he . . . plaintiffs' claim for retaliation may . . . proceed under section 1981(b)").

Defendants also argue that they were motivated, at least in part, by lawful motives, and thus they are still entitled to assert qualified immunity. "That [Defendants] acted, in part, with discriminatory motive does not defeat entitlement to qualified immunity . . . at least when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment stage." *McMillan v. DeKalb County,* 2006 WL 3204829, *2, 2006 U.S. App. LEXIS 27535, at *4 (11th Cir. Nov. 6, 2006) (per curiam) (citing *Foy v. Holston,* 94 F.3d 1528, 1534-35 (11th Cir. 1996)).

The Eleventh Circuit in *McMillan* held that "[i]n cases involving mixed motives, a public official is not

immunized from liability for an otherwise objectively valid act if the complained of act was undertaken *only* based on improper motive." *Id.*, 2006 WL 3204829, *2, 2006 U.S.App. LEXIS 27535, at *5 (citing *Crawford-El v. Britton,* 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) and *Foy,* 94 F.3d at 1535 n.9 (11th Cir. 1996)). "When improper motive is part of the underlying constitutional tort, a defendant is entitled to qualified immunity only when, among other things, the record indisputably establishes that the defendant in fact was motivated, at least in part, by lawful considerations." *Id.*, 2006 WL 3204829, *2, 2006 U.S.App. LEXIS 27535, at *6 (citing *Stanley v. City of Dalton, Ga.,* 219 F.3d 1280, 1296 (11th Cir. 2000)).

Plaintiffs have offered evidence that Defendants' actions of altering Drake, Kelley, and Bryant's positions or responsibilities, abolishing Lowe's job, and harassing Bryant, Drake and Kelley by removing their job responsibilities, withholding information and resources, and treating them differently from black managers were done with the sole purpose of instituting Jones's agenda to increase the number of black managers and eliminate white managers. Plaintiffs offer evidence that Drake, Bryant and Kelley were in fact targeted by Defendants to be removed from the Parks Department, and Defendants' managerial decisions were made with that sole intention in mind. Plaintiffs also offer evidence that when Lowe refused to participate in their plan, Defendants decided that he needed to be eliminated from the department. Defendants have offered their

own evidence that these decisions were made due to true staffing needs of the department and that many actions complained of by Plaintiffs were simply the Defendants' valid management choices and styles which Plaintiffs did not like. Although there is a genuine dispute, Plaintiffs' evidence is sufficient to show that Defendants' decisions were motivated solely by the intent to discriminate and were not based on any lawful motives. The Court finds that the evidence does not "indisputably establish that Defendants were motivated, at least in part, by lawful considerations."

Defendants "misapprehend the analytical framework applicable to qualified immunity in mixed motive cases." *Id.* Qualified immunity should be denied here because the evidence does not establish that the actions complained of by Plaintiffs indisputably was motivated *at least in part* by the reasons offered by Defendants for their employment decisions. The evidence here is that Defendants should have known that discrimination against Plaintiffs based on their race and retaliation against Lowe was unlawful and clearly established under the law, and the evidence does not indisputably show that Defendants were partially motivated by lawful considerations. The Court does not believe the law allows a public official defendant to engage in calculated racial discrimination costumed in a racially neutral garb of administrative actions so it can masquerade as a qualified immunity defense. The Court finds the Defendants in this case have not, and

cannot, "indisputably establish" they were motivated even in part by lawful considerations. In fact, Plaintiffs have presented sufficient evidence that it was unlawful conduct in which the Defendants engaged in here. Defendants are therefore not entitled to assert qualified immunity as to any of Plaintiffs' claims.

8. *Discriminatory Custom or Practice to Establish Official Capacity*

There is no respondeat superior liability under § 1983. *Griffin v. City of Opa-Locka,* 261 F.3d 1295, 1307 (2001). "When suing local officials in their official capacities[48] under § 1983, the plaintiff has the burden to show that a deprivation of constitutional rights occurred as a result of an official government policy or custom." *Cooper,* 403 F.3d at 1221; *see also Monell v. Dep't of Social Servs.,* 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Each Defendant

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[48] "[A] suit against a governmental officer 'in his official capacity' is the same as a suit against the entity of which the officer is an agent." *McMillian v. Monroe County,* 520 U.S. 781, 785 n.2, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997). "The Eleventh Circuit has held that when an officer is sued in his or her official capacity, the suit is simply another way of pleading an action against the city that the offer represents. Consequently, it would be redundant to allow [Plaintiffs] to sue both the [county] and the officers in their official capacity." *Hyath v. City of Decatur,* 2006 WL 825779, *11, 2006 U.S. Dist. LEXIS 21184, at *36 (N.D. Ga. Mar. 28, 2006) (citing *Busby v. City of Orlando,* 931 F.2d 764, 776 (11th Cir. 1991)).

in this case, except for Jones, argues that all of Plaintiffs' claims against them in their official capacity are barred under *Monell*. Jones only challenges Lowe's retaliation claim against him in his official capacity.

A local government body is liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . ." *Monell*, 436 U.S. at 694, 98 S.Ct. 2018. "A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. A custom is a practice that is so settled and permanent that it takes on the force of law." *Cooper*, 403 F.3d at 1221 (quotation and citations omitted). "[Section] 1983 liability may be imposed on a municipality based on governmental custom even though such a custom has not received formal approval through the body's official decisionmaking channels. . . . [T]o prove § 1983 liability against a municipality based on custom, a plaintiff must establish a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Griffin*, 261 F.3d at 1308 (citations and quotations omitted).

"In other words, a long-standing and widespread practice is deemed authorized by the policy-making officials because they must have known about it but

failed to stop it." *Brown v. City of Ft. Lauderdale,* 923 F.2d 1474, 1481 (11th Cir. 1991). "This threshold identification of a custom or policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or those officials whose acts may fairly be said to be those of the municipality." *McDowell v. Brown,* 392 F.3d 1283, 1290 (11th Cir. 2004). "State and local positive law determine whether a particular official has final policymaker authority for § 1983 purposes." *Cooper,* 403 F.3d at 1221.

"[M]unicipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); *see also Church v. City of Huntsville,* 30 F.3d 1332, 1342 (11th Cir. 1994) ("Only those municipal officers who have final policymaking authority may by their actions subject the government to § 1983 liability."); *Brown,* 923 F.2d at 1481 (stating that once the policymakers have been identified, it is for the jury to decide whether *their* decisions have caused the deprivation of rights at issue by . . . acquiescence in a long-standing practice or custom which constitutes the standard operating procedure of the local government entity).

"There are three ways to show a governmental policy or custom: 1) an express policy; 2) a widespread practice that is so permanent and well-settled as to constitute a custom; or 3) the act or decision of a municipal official with final policy-making authority." *Hyath v. City of Decatur*, 2006 WL 825779, **9-10, 2006 U.S. Dist. LEXIS 21184, at *29-30 (N.D. Ga. 2006).

In *Church v. City of Huntsville*, the Eleventh Circuit explained: "[M]unicipal liability may be based upon (1) an action taken or policy made by an official responsible for making final policy in that area of the city's business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker." *Church*, 30 F.3d at 1342. To establish the existence of a practice or custom under the second prong, "it is generally necessary to show a persistent and wide-spread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality." *Id.* at 1345; *see also Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995) (holding that to prevail against the County through a defendant sheriff in his official capacity, plaintiff must show a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker, and because the defendant sheriff was the County official responsible for making final policy for the jail, the County would be liable if the sheriff's actions or policies amounted to deliberate indifference to a

substantial risk of serious harm which resulted in the plaintiff's injury); *Depew v. City of St. Marys,* 787 F.2d 1496, 1499 (11th Cir. 1986) (upholding a verdict against a city on the basis of five incidents of excessive force, because the mayor and city council members were aware of prior incidents and therefore the city had implicitly ratified a custom or policy permitting excessive force).

Defendant Jones

Defendant Jones argues for summary judgment only on Lowe's § 1983 claim for retaliation against Jones in his official capacity. (Jones MSJ, at 40.) Jones argues that Lowe's position was merit protected and that Lowe exercised his right to administratively appeal the elimination of his position. He argues that final policymaking authority does not vest where an official's decisions are subject to meaningful administrative review. Plaintiffs argue that they have shown that a custom of discriminating against white managers existed because the county tacitly, or expressly, authorized the discrimination or displayed a deliberate indifference to it. Relying on *Hale,* Plaintiffs also argue that the custom of discrimination is "the functional equivalent of a policy adopted by the final policymaker," and it does not matter if the official who displayed indifference to the discrimination is not a final policymaker. (Pl. Resp. to Jones MSJ, at 30.) The Court disagrees.

"A municipality's failure to correct the constitutionally offensive actions of [a] department may rise to the level of a custom or policy if the municipality tacitly authorizes these actions or displays deliberate indifference towards the . . . misconduct." *Brooks v. Scheib,* 813 F.2d 1191, 1193 (11th Cir. 1987). In *Hale,* the plaintiff, a former inmate in the Tallapossa [sic] County jail, filed suit against a jailer and a sheriff in their individual capacities, and against Tallapoosa County through the sheriff in his official capacity, after being beaten by fellow inmates while being held in the jail. *Hale,* 50 F.3d at 1583. The complaint alleged in part that an excessive risk of inmate-on-inmate violence existed at the jail, that the defendants were deliberately indifferent to this risk, and that this deliberate indifference caused his beating. The Eleventh Circuit held that "to prevail against the County through [the sheriff] in his official capacity, [the plaintiff] was required to prove that the deprivation resulted from (1) an action taken or policy made by an official responsible for making final policy in that area of the County's business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker." *Id.* at 1582. Citing *Church,* it further reasoned that "[b]ecause Sheriff Smith was the County official responsible for making final policy for the jail, the County would be liable if Smith's actions or policies amounted to deliberate indifference to a substantial risk of serious harm which resulted in [the plaintiff's] injury." *Id.*

Contrary to Plaintiffs' argument, *Hale* did not hold that the final policymaker analysis is inapplicable, because the court based its decision on the fact that the defendant was indeed the final policymaker. Even under the "practice or custom" prong, the actual or constructive knowledge of the widespread discrimination must be attributed to either the governing body of the municipality or an official with final policymaking authority.

Final policymaking authority does not vest where an official's decisions are subject to meaningful administrative review. *Quinn v. Monroe Cty.*, 330 F.3d 1320, 1325 (11th Cir. 2003). Here, Lowe was entitled to appeal the elimination of his position pursuant to the DeKalb County Code, and he did so. A hearing was conducted on the matter, and the elimination of Lowe's position was affirmed by the hearing officer. Jones therefore did not have final policymaking authority over the abolishment of Lowe's position, and DeKalb County cannot be liable for Lowe's retaliation claim against Jones in his official capacity. *See McMillan v. DeKalb County*, No. 1:04-cv-3039, at 20 (N.D. Ga. 2005) (Martin, J.) (finding that the defendant county could not be held liable for plaintiff's termination under § 1983). Summary judgment on Lowe's retaliation claim against Jones in his official capacity is granted. Drake, Bryant and Kelley's claim for hostile work environment and Kelley's claim for constructive discharge against Jones in his official capacity remain.

Defendant Drew

Drew argues that all of Plaintiffs' § 1983 claims against her in her official capacity are barred because Plaintiffs cannot show that Drew is an official with final policymaking authority. (Drew MSJ, at 45.) First, the Court has held that because the abolishment of Lowe's position was subject to administrative review, the county cannot be held liable for the decision to abolish Lowe's job. Therefore, Lowe's claim for retaliation against Drew in her official capacity is barred. The remaining claims asserted against Drew in her official capacity are Drake, Bryant and Kelley's hostile work environment claim and Kelley's constructive discharge claim.

First, it is undisputed that there is no express policy of discrimination within the county. Plaintiffs, however, have put forth sufficient evidence that there was a "widespread practice . . . that is so permanent and well settled as to constitute a custom or usage with the force of law." *Griffin,* 261 F.3d at 1308. The Eleventh Circuit has further defined a custom to include "deeply imbedded traditional ways of carrying out policy." *Hyath,* 2006 WL 825779, *11, 2006 U.S. Dist. LEXIS, at *32 (citing *Fundiller v. Cooper City,* 777 F.2d 1436, 1442 (11th Cir. 1985)). The evidence is that Jones began implementing his agenda to eliminate white managers as soon as he took office and that many high-ranking officials within DeKalb County, including Stogner, Jones's Executive Assistant, Stone, the Director of Human Resources, Williams, an Assistant County Administrator, and

Drew, the Director of the Parks Department, were actively participating and furthering the agenda. Plaintiffs have also submitted other evidence that Jones implemented his plans in other departments within the county, such as the fire and police departments. Plaintiffs have submitted evidence that Defendant Jones stated that a goal of the administration was to hire employees that look like the population of DeKalb County, that Drew admitted that Defendant Jones had implemented racially motivated employment directives, and that Defendant Drew told Plaintiff Lowe to "dig up dirt" on white employees in the Department. Plaintiffs offer evidence that Jones, Stone, and Drew each told Lowe that a plan was in place to discriminate against white DeKalb County managers. Lowe testified that Jones told him the white people in the Department needed to [be] removed, and the whole department needed to be reorganized.

This evidence is sufficient for a reasonable jury to find that there was a widespread practice that is so permanent and well-settled as to constitute a custom, and that this practice was implemented and encouraged by Jones as CEO of DeKalb County.[49] *See*

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[49] Jones does not challenge Plaintiffs' contentions that he was a policymaker within DeKalb County regarding the employment actions experienced by Bryant, Kelley and Drake, or that Plaintiffs' evidence, though capable of being challenged at trial, does not show a custom or policy, approved of by Jones, of creating the hostile work environments and constructive discharge suffered by Plaintiffs Kelley, Drake, and Bryant.

Brown, 923 F.2d at 1481 (finding plaintiff had sufficiently alleged facts to show a custom of racial discrimination in the police department when plaintiff alleged a series of discriminatory practices over 5 years in which the police chief's [sic] acquiesced and even knew of the actions). Furthermore, there is no evidence in the record that these hostile work environment and constructive discharge claims are subject to meaningful administrative review.[50]

Although there is no evidence in the record that Drew had final policymaking authority sufficient to make the county liable for her acts in discriminating against Bryant, Drake, and Kelley, because the evidence indicates the actions taken by Drew were pursuant to a custom or practice instituted and approved of by Jones, her actions can be attributed to the county for purposes of § 1983.[51] Drew's motion for summary judgment on Bryant and Drake's hostile

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[50] The DeKalb County Code disciplinary action appeal process does not provide for a method to brings [sic] claims for discrimination based upon a hostile work environment or constructive discharge; it only provides for appeals from a disciplinary action such as suspension, demotion with a reduction in pay, or dismissal. (DeKalb County Code §§ 20-192, 20-194.)

[51] This is an unusual case because Plaintiffs have presented evidence that Jones actually established a policy, though unwritten and not public, of discriminating against white managerial employees. Plaintiffs have presented sufficient evidence for a jury to find that Jones's policy was supported and implemented by Defendants, who are management-level employees throughout the tenure of Jones's administration.

work environment claims against her in her official capacity is denied.[52] Drew's motion for summary judgment on Lowe's retaliation claim against her in her official capacity is granted.

Defendants Stogner, Williams and Stone

Defendants Stogner, Williams and Stone each make the same arguments as Drew that all Plaintiffs' claims against them in their official capacity are barred because Plaintiffs have not shown that the acts were a result of an official government policy or custom, or that they were a final policymaker with respect to any of the acts or decisions Plaintiffs complain of. (Stogner MSJ, at 45; Stone MSJ, at 43; Williams MSJ, at 43.) Lowe's claim for retaliation against Williams, Stogner and Stone in their official capacity is barred because the abolishment of Lowe's position was subject to administrative review. Plaintiffs have put forth sufficient evidence that discrimination against white managers was a widespread practice that is so permanent and well-settled as to constitute a custom or usage with the force of law. Stogner, Williams, and Stone's actions taken pursuant to that custom can therefore subject the county to liability, even though there is no evidence that they had final policymaking authority themselves. Stogner, Williams, and Stone's motions

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[52] The Court has granted summary judgment in favor of Drew on Kelley's constructive discharge claim against her.

for summary judgment on Bryant, Drake, and Kelley's hostile work environment claims and Kelley's constructive discharge claim against them in their official capacity are denied. Stogner, Williams, and Stone's motions for summary judgment on Lowe's retaliation claim against them in their official capacity are granted.

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Stogner's Motion for Summary Judgment [256] be **GRANTED** in part and **DENIED** in part. Defendant Stone's Motion for Summary Judgment [257] is **GRANTED**. Defendant Jones's Motion for Summary Judgment [259] is **GRANTED** in part and **DENIED** in part. Defendant Williams's Motion for Summary Judgement [sic] [263] is **GRANTED** in part and **DENIED** in part. Defendant Drew's Motion for Summary Judgment [262] is **GRANTED** in part and **DENIED** in part. Defendants' Joint Motion to Supplement Exhibit [282] is **GRANTED**.

Specifically, summary judgment is granted as to all Defendants on Kelley's discriminatory transfer claim, Bryant's discriminatory transfer claim, Drake's failure to promote and discriminatory transfer claims, and Lowe's § 1983 first amendment claim. Summary judgment is granted to all Defendants on Plaintiffs' conspiracy claim. Summary judgment is granted to Stone on Bryant and Drake's hostile work

environment claim. Summary judgment is granted to Drew and Stone on Kelley's hostile work environment claim and constructive discharge claim. Summary judgment is granted to Jones, Stone, and Williams on Lowe's retaliatory termination claim, and summary judgment is granted to all defendants on Lowe's retaliatory termination claims against them in their official capacities.

Summary judgment on Bryant and Drake's hostile work environment claim is denied as to Williams, Jones, Stogner, and Drew. Summary judgment on Kelley's hostile work environment claim and constructive discharge claim is denied as to Williams, Jones, and Stogner. Summary judgment on Lowe's retaliatory termination claim is denied as to Drew and Stogner. Summary judgment on Bryant and Drake's hostile work environment claims against Williams, Jones, Stogner, and Drew in their official capacities is denied. Summary judgment on Kelley's hostile work environment claim and constructive discharge claim against Williams, Jones, and Stogner in their official capacities is denied. Defendant Stone is dismissed from this action.

SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-16591-AA

MICHAEL BRYANT,
JOHN DRAKE,
BECKY KELLEY,
HERBERT LOWE,

Plaintiffs-Appellees,

versus

CEO DEKALB CO. VERNON JONES,
MARILYN BOYD DREW,
MORRIS WILLIAMS,
RICHARD STOGNER,
in their individual capacities
and in their official capacities

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 5, 2009)

BEFORE: TJOFLAT, ANDERSON and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
UNITED STATES CIRCUIT JUDGE

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981 Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

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42 U.S.C. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.